CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 37 SEPTEMBER 3, 2003 NO. 36

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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Bureau of Customs and Border Protection

General Notices

[CBP Decision 03–19]

Customs Accreditation of BSI Inspectorate America Corporation as a Commercial Laboratory

AGENCY: Customs and Border Protection, Department of Homeland Security

ACTION: Notice of Accreditation of BSI Inspectorate America Corporation of Tallaboa-Penuelas, Puerto Rico, as a Commercial Laboratory.

SUMMARY: BSI Inspectorate America Corporation of Tallaboa-Penuelas, Puerto Rico has applied to Customs and Border Protection under Part 151.12 of the Customs Regulations for accreditation as a commercial laboratory to analyze petroleum products under Chapter 27 and Chapter 29 of the Harmonized Tariff Schedule of the United States (HTSUS). Customs has determined that this company meets all of the requirements for accreditation as a commercial laboratory. Specifically, BSI Inspectorate America Corporation has been granted accreditation to perform the following test methods at their Tallaboa-Penuelas, Puerto Rico site: (1) Distillation of Petroleum Products, ASTM D86; (2) Flash-Point by Pensky Martens Closed Cup Tester, ASTM D93; (3) Water in Petroleum Products and Bituminous Materials by Distillation, ASTM D95; (4) API Gravity by Hydrometer, ASTM D287; (5) Kinematic Viscosity of Transparent and Opaque Liquids, ASTM D445; (6) Sediment in Crude Oils and Fuel Oils by Extraction, ASTM D473; (7) Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Method, ASTM D1298; (8) Water in Crude Oil by Distillation, ASTM D4006; (9) Percent by Weight of Sulfur by Energy-Dispersive X-Ray Fluorescence, ASTM D4294; and (10) Vapor Pressure of Petroleum Products, ASTM D5191. Therefore, in accordance with Part 151.12 of the Customs Regulations, BSI Inspectorate America Corporation of Tallaboa-Penuelas, Puerto Rico is hereby accredited to analyze the products named above.

Location: BSI Inspectorate America Corporation accredited site is located at: Bo. Encarnacion Road 127 Km 19.1, Tallaboa-Penuelas, Puerto Rico 00624

EFFECTIVE DATE: July 15, 2003.

FOR FURTHER INFORMATION CONTACT: Arlene Faustermann, Science Officer, Laboratories and Scientific Services, Customs and Border Protection, 1300 Pennsylvania Avenue, NW, Suite 1500 North, Washington, D.C. 20229, (202) 927–1060.

Dated: July 15, 2003

Donald A. Cousins,

Acting Executive Director, Laboratories and Scientific Services.

[Published in the Federal Register, August 21, 2003 (68 FR 50544)]

[CBP Decision 03–20]

Customs Approval of BSI Inspectorate America Corporation as a Commercial Gauger

AGENCY: Customs and Border Protection, Department of Homeland Security

ACTION: Notice of Approval of BSI Inspectorate America Corporation of Tallaboa-Penuelas, Puerto Rico, as a Commercial Gauger.

SUMMARY: BSI Inspectorate America Corporation of Tallaboa-Penuelas, Puerto Rico has applied to Customs and Border Protection under Part 151.13 of the Customs Regulations for approval as a commercial gauger to gauge petroleum products, animal and vegetable oils, and organic compounds. Customs has determined that this company meets all of the requirements for approval as a commercial gauger. Specifically, BSI Inspectorate America Corporation has been granted approval to gauge petroleum product under Chapter 27 and Chapter 29, animal and vegetable oils under Chapter 15 and organic compounds under Chapter 29 of the Harmonized Tariff Schedule of the United States (HTSUS). Therefore, in accordance with Part 151.13 of the Customs Regulations, BSI Inspectorate America Corporation of Tallaboa-Penuelas, Puerto Rico, is hereby approved to gauge the products named above.

Location: BSI Inspectorate America Corporation accredited site is located at: Bo. Encarnacion Road 127 Km 19.1, Tallaboa-Penuelas, Puerto Rico 00624.

EFFECTIVE DATE: July 17, 2003

FOR FURTHER INFORMATION CONTACT: Arlene Faustermann, Science Officer, Laboratories and Scientific Services, Customs and Border Protection, 1300 Pennsylvania Avenue, NW, Suite 1500 North, Washington, D.C. 20229, (202) 927–1060.

Dated: July 17, 2003

Donald A. Cousins,

Acting Executive Director, Laboratories and Scientific Services.

[Published in the Federal Register, August 21, 2003 (68 FR 50544)]

Notice of Issuance of Final Determination Concerning Fiber Optic Cable Products

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that the Bureau of Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of certain fiber optic cable products to be offered to the United States Government under an undesignated government procurement contract. The final determination found that based upon the facts presented, the countries of origin of products referred to as Glass, Glass Polymer patch cords, Fiber Interconnect Product cable assemblies and Multimode (ST MM) epoxy connectors are the United States, the United States, and Japan, respectively.

DATE: The final determination was issued on August 11, 2003. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of August 19, 2003.

FOR FURTHER INFORMATION CONTACT: Craig Walker, Special Classification and Marking Branch, Office of Regulations and Rulings (202–572–8836).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on August 11, 2003, pursuant to Subpart B of Part 177, Customs Regulations (19 CFR Part 177, Subpart B), CBP issued a final determination concerning the country of origin of certain fiber optic cable products to be offered to the United States Government under an undesignated government procurement contract. The CBP ruling number is HQ 562754. This final determination was issued at the request of 3M Company under procedures set forth at 19 CFR Part 177, Subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18).

The final determination concluded that, based upon the facts presented, the assembly in China of U.S.-origin fiber optic cable and Chinese-origin connectors to create Glass, Glass Polymer ("GGP") patch cords does not result in a substantial transformation of the components into a product of China. Therefore, the country of origin of the product is the United States. The final determination also concluded that neither the assembly in China of a Japanese-origin ceramic ferrule with U.S.-origin components to create connectors nor the subsequent assembly in China of the connectors with U.S.-origin fiber optic cable to produce Fiber Interconnect Product ("FIP") cable assemblies results in a substantial transformation of the components into products of China. Accordingly, the origin of the FIB cable assemblies is the United States. Finally, the final determination concluded that the assembly in China of a Japanese-origin ceramic ferrule with U.S., Canadian and Chinese components to produce Multimode (ST MM) epoxy connectors does not result in a substantial transformation of the components into products of China. Therefore, the country of origin of the ST MM epoxy connectors is Japan.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, Customs Regulations (19 CFR 177.30), states that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of August 19, 2003.

Dated: August 13, 2003

Myles B. Harmon for Michael T. Schmitz

Assistant Commissioner, Office of Regulations and Rulings

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 562754
August 11, 2003
MAR–2 RR:CR:SM 562754 CW
CATEGORY: Marking

Mr. Robert E. Burke
Counsel, Barnes, Richardson & Colburn, 303 East Wacker Drive, Suite 1100, Chicago, Illinois 60601

RE: Country of Origin of fiber optic cable products; government procurement; final determination

Dear Mr. Burke: This is in response to your letter dated May 9, 2003, on behalf of your client 3M Company ("3M") requesting a ruling on fiber optic cable products. 3M requests a country of origin determination for the fiber optic cable products in order to comply with the Federal Acquisition Regulations, 48 CFR 25.000 et seq., and the "Trade Agreements Act," 19 U.S.C. 2501 *et seq*. Specifically, this ruling concerns the following three products: Glass, Glass Polymer ("GGP") patch cords; Fiber Interconnect Product ("FIP") cable assemblies (also referred to as "FIP" patch cords"); and Multimode (ST MM) epoxy connectors. In accordance with your request, this response constitutes a final determination issued in accordance with 19 CFR § 177.22(c).

FACTS:

GGP Patch Cord

3M manufactures optical fiber, and further manufactures the fiber into optical fiber cable. These processes, all of which take place in the United States, begin with an imported fiber optic "seed," which 3M uses as raw material in manufacturing the optical fiber. The optical fibers, in turn, are made into optical fiber cable in the United States. Once the optical fiber cable is completed, 3M expects to send the cable to China, where it is to be cut and fitted with connectors. A description of the steps in the production process, beginning with the imported "seed," is as follows:

1. 3M produces optical fiber in the United States from an optic core, called a "seed," which is imported into the U.S. from the Netherlands. The seed is a multi-layered glass rod. The rings, or layers, or glass that comprise the seed are melded together and light travels through the layers of glass, all of which have different refractive indexes.

2. After importation, 3M adds a glass "sleeve" to the core. This process is known as "cladding." The seed and the sleeve comprise an optical fiber "preform," measuring approximately 2 1/2 inches in diameter by one meter.

3. 3M then draws the preform, via a drawing tower, into an extremely thin optical glass fiber. The resulting diameter of the optical fiber is 0.004 inches. The drawing also melds the core and glass sleeve into one integrated product, giving the optical fibers required optical properties. 3M refers to this optical fiber as "glass, glass, polymer," or "GGP". 3M owns a patent, in the U.S. and in several other countries, on the GGP process.

4. 3M then sends the optical fiber to another U.S. company, which adds a thermoplastic jacket and aramid fibers to the final optical fiber. The jacket and the fibers are added solely for the protection of the delicate optical fiber.

After jacketing, this company winds the finished optical fiber cable onto spools and sends it to China.

5. In China, the U.S. optical fiber cable in spools is cut to length and molded plastic connectors made in China are applied to the optical fiber cable using the following steps:

a. The spooled cable is cut to length

b. Each end of the cut cable is threaded through a plastic holder where about two inches of sheathing are removed from each end of the cable and any exposed Kevlar fiber is cut away and the plastic jacketing of the optical fiber is removed;

c. The exposed fiber is cleaned with alcohol and measured;

d. The fiber is threaded through a connector, glued to the connector and excess fiber is trimmed;

e. The connectors are placed into a finishing machine, where the fiber ends are automatically beveled and polished;

f. The metal springs, sourced from the United States, are inserted into a connector and ultrasonically welded into place;

g. The connectors are ultrasonically cleaned and tested and a protective plastic shroud is snapped onto the connector.

FIP Cable Assembly

1. 3M purchases optical fiber cable from an unrelated company in the U.S. This cable is a standard fiber optic cable, and consists of one or more fiber optic fibers, aramid (Kevlar™) for strength, and a thermoplastic coating that provides protection for the very thin fiber(s).

2. 3M purchases a ceramic ferrule in Japan. This ferrule, a hollow cylinder, is used to align the ends of the optical fibers as the fibers are inserted into the connectors. The hollow center of the ferrule contains one channel that is designed to fit the optical fiber and to align the fiber ends, enabling light to pass through the connection.

3. 3M purchases or self-produces plastic parts to be used in the cable connectors. All self-produced parts are molded in the United States.

4. 3M sends the spooled fiber optic cable and plastic parts, along with a small metal ring from the U.S., and the ferrule from Japan, to China.

5. In China, the ceramic ferrule, the metal ring, and the plastic parts are assembled into a connector for the ends of the cable assemblies. The fiber optic cable is also cut-to-length and assembled with the connectors. Specifically, the steps involved in the assembly process are as follows:

a. The spooled cable is cut to length;

b. Each end of the cut cable is threaded through a respective plastic boot and the metal ring;

c. After removing about two inches of sheathing, Kevlar(tm) fiber, and plastic jacketing of the cable, the exposed fiber is cleaned with alcohol and measured;

d. The fiber is threaded through the ferrule and fastened by adhesive;

e. The metal ring is attached; by crimping, and the fiber is trimmed;

f. The exposed ends of the fiber are scored, machine-polished, and cleaned;

g. The unit is inspected and tested, and a plastic protective dust cap is placed on it.

ST MM Epoxy Connector

3M also separately imports a connector, called an "ST MM Epoxy Connector" from China. This connector is similar to the connector used on the FIP Cable Assemblies described above, and the component source and assembly process is also substantially similar. In this case, the assembly consists of the following components:

1. 3M purchases a Japanese made ceramic ferrule which it provides to the assembler. This ferrule is a hollow cylinder, used to align the ends of the optical fibers as the fibers are inserted into the connectors. The hollow center of the ferrule contains one channel that is highly engineered to fit the optical fibers exactly and to provide a precise alignment of the optical fiber ends to minimize the loss of light in the connection.

2. 3M supplies the assembler with an epoxy ring, a spring, a c-clip and tygon tubes from the United States. 3M also supplies the assembler with a small, metal "backbone" and a metal "bayonet" from Canada. Packing materials and labels are from China.

3. 3M supplies the assembler with a plastic dust cap and a boot, made in China.

The assembly process is as follows:

1. The backbone and epoxy ring are assembled and glued with the ceramic ferrule, bayonet, spring and c-clip to form the ST MM Epoxy Connector.

2. The dust cap is then put over the assembly. This cap is only used for protection of the connector during transit; it is removed before final use.

3. The capped connector is put into the plastic bag, along with the tygon tube and the boot. The boot and tygon tubing is added to the connector by the final user to provide strain relief. (The Tygon tubing is used to protect the fiber when the connector is terminated onto 900um fiber. It is not used 100% of the time). The end user determines if the assembly needs the tygon tubing.

ISSUES:

For purposes of government procurement, what is the country of origin of the patch cords, FIP Cable Assembly and ST MM Epoxy Connector processed as described above?

LAW AND ANALYSIS:

Under Subpart B of Part 177, 19 CFR 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 *et seq.*), the Bureau of Customs and Border Protection (CBP) issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

In regard to determining the country of origin of goods intended for government procurement, section 177.22(a), Customs Regulations (19 CFR § 177.22(a)), provides, in pertinent part, as follows:

For the purpose of this subpart, an article is a product of a country or instrumentality only if (1) it is wholly the growth, product, or manufacture of that country or instrumentality, or (2) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of com-

merce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

19 CFR § 177.22(a)(1) does not apply in the instant case because the fiber optic cable products are not wholly produced in the United States. Therefore, 19 CFR § 177.22(a)(2) is applicable.

An article that consists in whole or in part of materials from more than one country is a product of the last country in which it has been substantially transformed into a new and different article of commerce with a name, character, and use distinct from that of the article or articles from which it was so transformed. See *United States v. Gibson-Thomsen*, 27 C.C.P.A. 267 (1940); *Uniroyal Inc. v. United States*, 542 F. Supp. 1026 (Ct. Int'l Trade 1982), *aff'd*, 702 F.2d 1022 (Fed. Cir.1983); *Koru North America v. United States*, 701 F. Supp 229 (Ct. Int'l Trade 1988); *National Juice Products Ass'n v. United States*, 628 F. Supp. 978 (Ct. Int'l Trade 1986); *Coastal States Marketing Inc. v. United States*, 646 F. Supp. 255 (Ct. Int'l Trade 1986), *aff'd*, 818 F.2d 860 (Fed.Cir.1987); *Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535 (Ct. Int'l Trade 1987).

If the manufacturing or combining process is a minor one which leaves the identity of the imported article intact, a substantial transformation has not occurred. See *Uniroyal Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (CIT 1982). Assembly operations which are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. See C.S.D. 80–111, C.S.D. 85–25, and C.S.D. 90–97.

GGP Patch Cords

In the case of the patch cords, a foreign "seed" is used in the U.S. in the manufacture of optical fiber cable. The first issue is whether the processing in the United States performed on this imported "seed" results in a substantial transformation. In Headquarters' Ruling Letter ("HRL") 561774 dated January 29, 2001, Customs addressed a similar situation. In HRL 561774, the issue involved the country of origin marking of imported glass rod ("cane") used in the production of optical fiber preforms in the U.S. The imported cane was subjected to a "overcladding" process to create the fiber preform. According to the facts in HRL 561774, [t]he fiber itself consists of two different types of glass—one making up the "core" [of the preform, *i.e.*, cane], and the other making up the "cladding"—surrounded by a protective acrylate coating. The core is the light-guiding region of the fiber, while the cladding, which has a different index of refraction than the core, ensures that the light signal remains within the core as it is carried along the fiber's length.

Customs held that, as the optical properties are imparted at the preform stage of production, the "essence" or character of the preform does not derive from the cane, but from the added cladding and its interaction with the core (cane). Therefore, we found that the production of the fiber preform resulted in a substantial transformation of the imported cane.

In the present case, an imported multi-layered glass rod (referred to as a "seed") is subjected to a "cladding" process in the U.S., involving the addition of a glass "sleeve" to the core. The preform is then drawn into optical glass fiber which, in turn, is made into optical fiber cable. Consistent with the holding in HRL 561774, we find that the above processing in the U.S. (specifically, the operations resulting in the preform) substantially transforms the foreign-origin "seed" into a "product of" the United States.

The second issue involving this first product is whether the operations performed in China result in a substantial transformation of the U.S.-origin optical fiber cable into a "product of" China. The U.S.-origin optical fiber cables are sent to China. In China, the optical fiber cable is cut-to-length, two inches of sheathing is removed from each end of the cable, and plastic connectors of Chinese origin are attached to each end of the cable.

In C.S.D. 85–25 (HRL 561392) dated September 25, 1984, Customs held that an assembly does not constitute a substantial transformation unless the operation is "complex and meaningful." The Bureau of Customs and Border Protection (CBP) criteria for determining whether an operation is "complex and meaningful" depends upon the nature of the operation, including the number of components assembled and number of different operations involved. Prior CBP rulings raise additional considerations such as processing time, costs, visibility of the imported article after processing, and skill required by the assembly operation.

In HRL 561392 dated June 21, 1999, Customs considered the country of origin marking requirements of an insulated electric conductor which is an electrical cable with pin connectors at each end used to connect computers to printers or other peripheral devices. The cable and connectors were made in Taiwan. In China, the cable was cut to length and connectors were attached to the cable. Customs held that the cutting of the cable to length and assembly of the cable to the connectors in China did not result in a substantial transformation. In HRL 560214 dated September 3, 1997, Customs held that where wire rope cable was cut to length, sliding hooks were put on the rope, and end ferrules were swaged on in the U.S., the wire rope cable was not substantially transformed. Customs concluded that the wire rope maintained its character and did not lose its identity and become an integral part of a new article when attached with the hardware. In HRL 555774 dated December 10, 1990, Customs held that Japanese wire cut to length and electrical connectors crimped onto the ends of the wire was not a substantial transformation.

In the case of the GGP patch cords in this case, it is our opinion that the cutting of the cable to length and assembly of the cable to the Chinese-origin connectors in China does not result in a substantial transformation of the cable. Therefore, as the connectors lose their separate identity when combined with the fiber optic cable, the country of origin of the imported optical fiber cable is the United States.

FIP Cable Assemblies

In the case of the FIP cable assembly, a Japanese-origin ceramic ferrule and fiber optic cable (purchased from an unrelated company in the U.S.), metal ring (purchased in the U.S.), and plastic parts (purchased in the U.S. or self-produced by 3M in the U.S.) are used during the assembly operation in China. First, the connectors are assembled using the ferrule, adhesive, plastic covers, and a metal ring. The ferrule gives the connector its form and function. The connectors are then attached to each end of the fiber optic cable. For purposes of this ruling, we are assuming that those components said to be purchased in the U.S. for use in making the FIP cable assembly are of U.S. origin.

In your submission, you state that the assembly operation for the FIP cable assembly is substantially similar to that described above for the GGP patch cord. You mention that the only major difference is that the FIP con-

nectors include the Japanese-origin ferrule, which provides the structure and the enclosure for the cable at the point of connectivity. According to your submission, the ceramic ferrule is precisely designed to allow the joining of hair-thin fiber optic cables. The other parts of the connector are simply a means of affixing the ferrule in place. You assert that the assembly operation performed in China does not result in a substantial transformation of either the ferrule or the fiber optic cable. Therefore, you contend that the country of origin of the imported FIP cable assembly is the U.S. as the fiber optic cable imparts the essential character to the cable assembly or, alternatively, that the country of origin of the fiber optic portion of the assembly is the U.S. and the origin of the connector portion is Japan.

In HRL 556020 dated July 1, 1991, Customs addressed the issue of whether electrical connectors produced in a designated beneficiary developing country under the Generalized System of Preferences (GSP) qualified as substantially transformed constituent materials of the electrical cable to which they were attached for purposes of the 35% value-content requirement under the GSP. The production of the connectors involved machining brass rod into contact pins and then joining the contact pins with plastic connector housings. Customs held that, while the initial fabrication of the contact pins from brass rod resulted in a substantial transformation, neither the subsequent assembly of the contact pins with connector housings to create the electrical connectors nor the later assembly of the electrical connectors with the cable resulted in a second substantial transformation. We stated that these are considered simple assembly operations which will not result in a substantial transformation, as they involve a small number of components and do not appear to require a considerable amount of time, skill, attention-to-detail, or quality control.

Similarly, in the instant case, we find that neither the U.S.-origin fiber optic cable nor the Japanese-origin ferrule undergoes a substantial transformation in China as a result of the assembly operations performed there to create the FIP cable assemblies. These are considered simple assembly operations involving only a small number of components. In considering the last country in which the FIP cable assembly underwent a substantial transformation, it is our opinion that the cable assembly's characteristics are primarily imparted at the time that the fiber optic cable is manufactured in the U.S. The fibers making up the cable serve as the transmission medium through which light signals travel. Therefore, the country of origin of the imported FIP cable assemblies is the U.S.

ST MM Epoxy Connector

In your submission, you state that the assembly operation for the ST MM Epoxy Connector is substantially similar to that described above for the FIP cable assembly connector. Based on the reasoning cited above and as found in HRL 556020, it is our opinion that the assembly is relatively simple and only involves a small number of components. Therefore, in considering the last country in which the connectors underwent a substantial transformation, we believe that the connector's characteristics are primarily imparted by the ferrule which provides the structure and enclosure for the fiber optical cable at the point of connectivity. Therefore, the country of origin of the MM Epoxy Connector is Japan.

HOLDING:

Based on the facts presented, joining the Chinese-origin connectors to the U.S.-origin fiber optic cable in China to create the GGP patch cords does not constitute a substantial transformation. As a result, the imported GGP patch cord is a product of the United States for government procurement purposes under 19 CFR Part 177, Subpart B.

Based on the facts presented, the assembly of the connectors and the subsequent assembly of the connectors to the fiber optic cable in China to produce the FIP cable assembly does not result in a substantial transformation. Therefore, as the very essence of the cable is imparted by the fiber optical cable, the FIP cable assembly is a product of the United States for government procurement purposes.

Based on the facts presented, the assembly of the ST MM epoxy connector in China does not result in a substantial transformation. Therefore, as the very essence of the connector is imparted by the ferrule, the connector is a product of Japan for government procurement purposes.

Notice of this final determination will be given in the **Federal Register** as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination.

Any party-at-interest may, within 30 days after publication of the **Federal Register** notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Myles B. Harmon for Michael T. Schmitz,

Assistant Commissioner, Office of Regulations and Rulings.

[Published in the Federal Register, August 19, 2003 (68 FR 49788)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, August 20, 2003,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF WOOD FRAME MIRRORS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security

ACTION: Notice of modification of ruling letter and revocation of treatment relating to tariff classification of wood frame mirrors.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of wood frame mirrors under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published in the Customs Bulletin on June 4, 2003. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 2, 2003.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, General Classification Branch, (202) 572–8721.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the Customs Bulletin on June 4, 2003, proposing to modify NY G88576, dated March 29, 2001, regarding the classification of wood frame mirrors. No comments were received in response to the notice.

As stated in the proposed notice, this modification will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of

the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY G88576 and any other ruling not specifically identified in order to reflect the proper classification of the wood frame mirrors pursuant to the analysis set forth in HQ 966446. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: August 13, 2003

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966446
August 13, 2003
CLA–2 RR:CR:GC 966446 RSD
CATEGORY: Classification
TARIFF NO.: 7009.92.50

MR. PAUL VROMAN
DANZAS AEI CUSTOMS BROKERAGE SERVICES
29200 Northwestern Highway
Southfield, MI 48034

RE: Modification of NY G88576; Mirrors

DEAR MR. VROMAN:

This letter is with respect to NY G88576 dated March 29, 2001, which was issued to you on behalf of your client, Durham Furniture, by the Director, National Commodity Specialist Division with regard to the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of certain wood frame mirrors. We have reviewed the classification in NY G88576 and have determined that it is incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modification) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), a notice was published on June 4, 2003, in the CUSTOMS BULLETIN, Volume 37, Number 23 proposing to modify NY G88576. No comments were received in response to this notice.

FACTS:

The imported merchandise consists of wood framed glass mirrors designed for attachment to dressers and chests. All of the mirrors have a reflecting

area greater than 1000 sq. cm. The mirrors have steel rods on the back as they are designed to be attached to the dressers. The dressers and chests on which the mirrors are attached are made of wood and are designed for use in the bedroom. You requested the tariff classification of the mirrors when they are imported under two scenarios: 1) when the mirror is imported with the dresser; and 2) when the mirror is imported by itself. Pictures of the mirrors and dressers were submitted with your request. Customs classified the mirror, when imported with a dresser or chest under subheading 9403.50.90, HTSUS, which provides for "Other furniture and parts thereof: Wooden furniture of a kind used in the bedroom: Other: Other." Customs determined the applicable subheading for the mirror, when imported separately, to be 9403.90.80, HTSUS, which provides for: "Other furniture and parts thereof: Parts: Other: Other." As stated above, we have reviewed the classification of the mirror imported separately and have determined that it is incorrect.

ISSUE:

What is the proper classification of the subject mirrors when imported separately?

LAW AND ANALYSIS:

The General Rules of Interpretation (GRI's) governs classification of goods under the HTSUS. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

The provisions under consideration are as follows:

7009	Glass mirrors, whether or not framed, including rear view mirrors:
7009.92	Framed:
7009.92.50	Over 929 cm in reflecting area

* * *

9403	Other furniture and parts thereof:
9403.90	Parts:
	Other:
9403.90.80	Other

Additional U.S. Rule of Interpretation 1(c) states that "[i]n the absence of special language or context which otherwise requires . . . a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for 'parts' or 'parts and accessories' shall not prevail over a specific provision for such part or accessory. . . ."

Pursuant to Additional U.S. Rule of Interpretation 1(c), we find that the subject goods are provided for in the provision for glass mirrors in heading 7009, HTSUS. They are classified in subheading 7009.92.50, HTSUS. This determination is consistent with NY J81094, dated March 3, 2003, which held that mirrors that are to be attached to dressers after their importation are classified under subheading 7009.92.50, HTSUS.

Accordingly, pursuant to Additional U.S. Rule of Interpretation 1(c), we find that the mirrors are classified in subheading 7009.92 50, HTSUS.

HOLDING:

The subject mirrors that are imported separately are provided for in heading 7009, HTSUS, and are classified in subheading, 7009.92.50, HTSUS, as:

"Glass mirrors, whether or not framed, including rear-view mirrors: Framed: Over 929 cm in reflecting area."

EFFECT ON OTHER RULINGS:

NY G88576 dated March 29, 2001 is modified with respect to the subject mirrors imported separately. The other classification for the mirrors imported with dressers specified in NY G88576 remains in effect. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

NOTICE OF MODIFICATION AND REVOCATION OF CLASSIFICATION LETTERS AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION BASED ON THE INTENT OF THE IMPORTER

AGENCY: Bureau of Customs and Border Protection, Dept. of Homeland Security

ACTION: Notice of modification of ten ruling letters and revocation of three ruling letters and revocation of treatment relating to the classification of suits, track suits, and two-piece swimwear based on the intent of the importer.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is modifying ten ruling letters and revoking three ruling letters relating to the classification of suits, track suits, and two-piece swimwear because they erroneously took into account the claimed intent of the importer rather than consideration of the goods in their condition as imported under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, CBP is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed action was published on July 2, 2003 in the CUSTOMS BULLETIN in Volume 37, Number 27. No comments were received in response to this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 2, 2003.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Textiles Branch, at (202) 572–8824.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice to modify ten ruling letters and revoke three ruling letters relating to the tariff classification of the merchandise based on the intent of the importer, and to revoke any treatment accorded to substantially identical merchandise was published in the July 2, 2003 CUSTOMS BULLETIN, Volume 37, Number 27. No comments were received in response to this notice. CBP is modifying ten ruling letters which are as follows: New York Ruling Letters (NY) A87564, dated October 10, 1996; NY B83511, dated April 23, 1997; NY F83145, dated March 23, 2000; NY F83716, dated April 11, 2000; NY F83799, dated April 17, 2000; NY F83800, dated April 17, 2000; and Headquarters Ruling Letters (HQ) 088423, dated May 20, 1991; HQ 952584, dated December 8, 1992; HQ 952704, dated February 1, 1993; and HQ 955519, dated April 15, 1994. CBP is revoking three ruling letters, which are as follows: HQ 952907, dated January 29, 1993; HQ 953231, dated May 12, 1993 and HQ 956298, dated March 9, 1995.

In each of the aforementioned rulings, the merchandise's classification was based on how the importer intended to sell the merchandise. Upon review of these rulings, CBP has determined that although the classification of the merchandise was correct, in all but three rulings, the analysis applied to reach the classification determination was incorrect. Classification of the merchandise in each of

the rulings should have been based on the goods' condition as imported.

As stated in the notice of proposed revocation, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical merchandise. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, CBP's personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUS. Any person involved with substantially identical merchandise should have advised CBP during the comment period. An importer's reliance on treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is modifying New York Ruling Letters (NY) A87564, dated October 10, 1996; NY B83511, dated April 23, 1997; NY F83145, dated March 23, 2000; NY F83716, dated April 11, 2000; NY F83799, dated April 17, 2000; NY F83800, dated April 17, 2000; and Headquarters Ruling Letters (HQ) 088423, dated May 20, 1991; HQ 952584, dated December 8, 1992; HQ 952704, dated February 1, 1993; and HQ 955519, dated April 15, 1994 and revoking HQ 952907, dated January 29, 1993; HQ 953231, dated May 12, 1993 and HQ 956298, dated March 9, 1995, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letters HQ 965923, HQ 965932, HQ 965933, HQ 965934, HQ 965929, HQ 965930, HQ 965931, HQ 965935, HQ 965927 and HQ 965928 (see Attachments "A–J"). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by the CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

DATED: August 14, 2003

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965923
August 14, 2003
CLA–2 RR:CR:TE 965923 TF
CATEGORY: Classification
TARIFF NO.: 6204.13.2010; 6204.19.2000; 6204.33.5010; 6204.63.3510; 6204.39.3010; 6204.69.2510

MS. REBECCA CHEUNG
ANN TAYLOR, INC.
1372 Broadway
New York, NY 10018

RE: Modification of women's suit-type jackets and matching pants and skirts; Imported in Equal Numbers; Classification Based on Condition at the Time of Importation; Classification Based on the Intended Manner of Sale

DEAR MS. CHEUNG:

Pursuant to your classification requests, Customs issued four New York Ruling Letters ("NY"), NY F83800 dated April 17, 2000, NY F83799 dated April 17, 2000, NY F83716 dated April 11, 2000 and NY F83145 dated March 23, 2000, to your company. These rulings pertained to the tariff classification of various women's suits, jackets, pants and skirts. Upon review, the Bureau of Customs and Border Protection (CBP) has determined that the classification is correct, however the analysis applied to reach the classification determination is incorrect. This ruling letter sets forth the correct classification determination based on the articles' condition as imported rather than the intended manner of sale as represented by the importer.

NY F83800, NY F83799, NY F83716 and NY F83145 are hereby modified for the reasons set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed modification of NY F83800 dated April 17, 2000, NY F83799 dated April 17, 2000, NY F83716 dated April 11, 2000 and NY F83145 dated March 23, 2000 was published on July 2, 2003, in Vol. 37, No. 27 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

In each of the four rulings, you questioned how your marketing strategy would be perceived by Customs and you provided the following information:

- the importer will purchase styles as a suit, i.e., in equal numbers with each jacket and skirt or pants matching in fabric, size, color and composition;

- the garments will be sold as a set in retail stores;
- the garments will be designated by separate style numbers on the company's purchase orders and cross-referenced;
- the garments will be shipped together in the same container in equal numbers of matching tops and bottoms, matched to size, and will be allocated and shipped to stores in a 1 to 1 ratio, matched to size;
- the garments will not be displayed together on a single hanger but will be displayed separately in adjacent locations;
- although the garments are clearly designed to be worn together, consumers will be able to purchase individual pieces of jackets, skirts or pants in different sizes for fit considerations;
- the jackets and skirts or pants will be individually ticketed for sale and each component will be marked with the country of origin;
- if additional or separate quantities of the individual pieces are required, a separate purchase order will be provided;
- the additional pieces may be imported either with the suits or separately.

Suit 1 was originally the subject of NY F83800 dated April 17, 2000. Suit 1 is designated as style numbers 49–40151 (jacket) and 49–40152 (skirt) which constitute a woman's skirt suit constructed from 97 percent polyester and 3 percent rayon woven fabric. Both garments are fully lined. The jacket is constructed from eight panels sewn together lengthwise and features long hemmed sleeves with button trim, a collar and lapels, shoulder pads, two beson pockets below the waist and a full front opening secured by three buttons. The skirt features a back vent and a back zipper closure. The garments are individually marked with separate style numbers and sold as a suit in retail stores.

Suit 2 was originally the subject of NY F83799 dated April 17, 2000. Suit 2 is designated as a three-piece grouping consisting of a jacket (style number 49–40124), a skirt (style number 49–40126) and pants (style number 49–40126). The garments are constructed from 47 percent rayon, 41 percent polyester and 12 percent twill woven fabric and are fully lined. The jacket is constructed from more than four panels sewn together lengthwise and features long hemmed sleeves with button trim, a collar and lapels, shoulder pads, two pockets below the waist and a full front opening secured by four buttons. The skirt features two front pockets and a side zipper closure. The pants feature a full lining, two front pockets and a side zipper closure. These garments will also be imported in petite sizes under style numbers 56–43706, 56–43708 and 56–43710

Suits 3 and 4 were originally subjects of NY F83716 dated April 11, 2000. Both are women's pants suits. Suit 3 is designated as style numbers, 49–43692 (jacket) and 49–40149 (pants), and constitutes a women's pantsuit constructed from 100% polyester woven fabric. Both garments are fully lined. The jacket is constructed from six panels sewn together lengthwise and features long hemmed sleeves, a collar with lapels, a four button front closure, shoulder pads and two pockets below the waist. The pants have a side zipper opening and two pockets. Suit 4 is designated as style numbers 49–40348 (jacket) and 49–40351 (pants) and constitutes a woman's pantsuit constructed from 71% acetate and 29% polyester woven fabric. Both garments are fully lined. The jacket is constructed from eight panels sewn together lengthwise and features long hemmed sleeves, lapels, shoulder pads, two besom pockets below the waist and a full front opening secured by five

buttons. The pants feature a hook-and-eye closure on the waist and a zippered placket in the center. The garments will also be imported in petite sizes under style numbers 56–43726 and 56–43727.

Suit 5 was originally the subject of NY F83145 dated March 23, 2000. It is designated as style numbers 51–41630 (jacket) and 52–41757 (pants), and constitutes a women's suit constructed from 64% acetate and 36% polyester woven fabric. Both garments are fully lined. The jacket is constructed from eight panels sewn together lengthwise and features long hemmed sleeves, lapels, shoulder pads, two besom pockets below the waist and a full front opening secured by two buttons. The pants feature a hook-and-eye closure on the waist and a zippered placket in the center.

ISSUE:

What is the proper classification of the subject suits under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Chapter 62 provides for articles of apparel and clothing accessories, not knitted or crocheted. Note 3(a) to Chapter 62, HTSUSA, defines the term "suit" as a set of garments composed of two or three pieces made up, in respect of their outer surface, in identical fabric and comprising:

> —one suit coat or jacket the outer shell of which, exclusive of sleeves, consists of four or more panels, designed to cover the upper part of the body, possibly with a tailored waistcoat in addition whose front is made from the same fabric as the outer surface of the other components of the set and whose back is made from the same fabric as the lining of the suit coat or jacket; and
>
> —one garment designed to cover the lower part of the body and consisting of trousers, breeches or shorts (other than swimwear), a skirt or a divided skirt, having neither braces nor bibs.

All of the suit components must be of the same fabric construction, color and composition; they must also be of the same style and of corresponding or compatible size.

Women's suits are provided *eo nomine* in heading 6204 and are classifiable pursuant to GRI 1, HTSUSA. Unlike "sets", which are provided within GRI 3(b), suits are not required to be "put up for retail sale." Further, Note 3(a) to Chapter 62 does not require that suit components be put up for retail sale. Rather, in order for suit components to be classifiable as suits of heading 6204 (pursuant to Note 3(a)), the suit components are required at the time of importation to be present together in the same shipment in equal amounts, but need not be packed together.

In this instance, the samples of the four rulings at issue are packed together in the same shipment within the same container in equal numbers of matching tops and bottoms. Therefore, they meet the terms of Note 3(a) to Chapter 62. Further, Customs has clearly articulated its view of how suits are to be classified in HQ 962125, dated May 5, 2000. In HQ 962125, Customs clarified that when matching suit jackets and bottoms, which meet the chapter note definition of suits are imported in the same shipment (in equal numbers and in the same size range), the garments are to be classified as suits based on their condition as imported. It is also stated that the intent of the importer is irrelevant to the goods' classification.

This ruling serves to apply HQ 962125, by determining that the subject articles, when imported together in equal quantities that are matched by size and color, meet the tariff definition of suits as provided by Note 3 of Chapter 62 and are classified in heading 6204 as provided by GRI 1, rather than applying the intent of the importer. In this instance, the subject suits, based upon the submitted facts, meet the terms of Note 3(a) to Chapter 62 to be classified as suits.

Therefore, we are modifying the four rulings' reference to the intent of the importer as this has no bearing on the classification determination and we are classifying the merchandise based on their condition as imported in heading 6204, HTSUSA, which provides for women's suits. For further details, we refer you to HQ 962125, which is enclosed.

HOLDING:

The following four rulings are hereby modified with regard to classification based on the intent of the importer:

- NY F83800, dated April 17, 2000
- NY F83799, dated April 17, 2000
- NY F83716, dated April 11, 2000
- NY F83145, dated March 23, 2000

In these aforementioned rulings, we find the analysis portion that pertains to the classification based on the intent of the importer to be incorrect. Rather the classification analysis should be based upon the merchandise's condition as imported. We refer you to the respective rulings for the appropriate classification within the Tariff.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965932
August 14, 2003
CLA–2 RR:CR:TE 965932 TF
CATEGORY: Classification
TARIFF NO.: 6211.33.0030; 6211.33.0035

MR. ROB TARQUINIO
ROYTEX, INC.
16 East 34st Street,
New York, NY 10016

RE: Revocation of HQ 952704; Classification of track suits; Imported in Equal Numbers; Classification Based on Condition at the Time of Importation, Classification Based on the Intent of Importer; HQ 962125

DEAR MR. TARQUINIO:

Customs previously issued PC 876238, dated July 23, 1992, which originally classified certain styles of jackets and trousers sets as woven track suits in heading 6211, HTSUSA. Pursuant to your request for modification of PC 876238, Customs issued Headquarters Ruling Letter (HQ) 952704, dated February 1, 1993 and subsequently reclassified the merchandise as separates in subheadings 6201.93.3510 and 6203.43.4010, HTSUSA.

Upon review, the Bureau of Customs and Border Protection (CBP) has determined that this classification is incorrect.

HQ 952704 is hereby revoked for the reasons set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed revocation of HQ 952704, dated February 1, 1993 was published on July 2, 2003, in Vol. 37, No. 27 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

The merchandise of HQ 952704, dated February 1, 1993, is described as four styles of men's jacket and trousers sets that are designated as style numbers 290113, 290115, 290117, and 290121. These four styles consist of jackets and trousers that are each composed of an inner lining of 65 percent polyester, 35 percent cotton and an outer shell of 100 percent Trilobal nylon. The jacket and trouser sets are imported from Malaysia.

PC 876238, dated July 23, 1992 classified the goods as track suits of heading 6211, HTSUSA. HQ 952704 modified PC 876238 and reclassified the goods separately in subheading 6201.93.3510, HTSUSA, which provides for other men's anoraks, windbreakers and similar articles of man-made fibers, and subheading 6203.43.4010, HTSUSA, which provides for other men's trousers of synthetic fibers. The classification determination was based on the intent of the importer to sell the components as separates.

ISSUE:

What is the proper classification of the four styles of merchandise within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Woven track suits are provided *eo nomine* in heading 6211, HTSUSA. EN 62.11 states, in pertinent part, that "the provisions of the Explanatory Note to heading 61.12 concerning track suits . . . and of the Explanatory Note to heading 61.14 concerning other garments apply, *mutatis mutandis*, to the articles of this heading." We refer to EN 61.12 which describes track suits as consisting of two garments, namely:

> —A garment meant to cover the upper part of the body down to or slightly below the waist. It has long sleeves, with ribbed or elasticated bands, zip fasteners or other tightening elements at the cuffs. Similar tightening elements, including drawstrings, are generally to be found at the bottom of this garment. When it has a partial or complete opening at the front, it is generally fastened by means of a slide fastener (zipper). It may or may not be fitted with a hood, a collar and pockets.
>
> —A second garment (a pair of trousers) which may be either close or loose fitting, with or without pockets, with an elasticated waistband, drawstring or other means of tightening at the waist, with no opening at the waist and therefore no buttons or other fastening system. However, such trousers may be fitted with ribbed or elasticated bands, slide fasteners (zippers) or other tightening elements at the bottom of the trouser-legs which generally go down to ankle level. They may or may not have footstraps.

Track suits are classifiable based on GRI 1. As such, track suit components that form sets are not required to be "put up for retail sale" under GRI 3(b). In order for the subject track suit components to be classifiable within heading 6211, HTSUSA, as track suits based on their condition as imported, they should be packed in the same shipment at the time of importation, but not necessarily on the same hanger or in the same container. *See* Headquarters Ruling (HQ) 962125, dated May 5, 2000, referencing the following: Headquarters Memorandum 085944 PR, dated May 10, 1991; HQ 088423, dated May 20, 1991; HQ 952584, dated December 8, 1992; HQ 952907, dated January 29, 1993; HQ 952704, dated February 1, 1993; HQ 953231, dated May 12, 1993; HQ 954270, dated August 17, 1993; HQ 955519, dated April 15, 1994; HQ 956298, dated March 9, 1995.

In this instance, the subject track suit components are shipped in the same shipment, but separately packaged. The subject track suit components are provided *eo nomine* in heading 6211, HTSUSA. Further, we refer you to

HQ 962125, dated May 5, 2000, which is listed above. In HQ 962125, Customs expressed the view that classification is based on the merchandise's condition as imported rather than the intent of the importer. Id. (clarifying that matching suit jackets and bottoms are classifiable as suits based on their condition as imported if they are imported in equal numbers in the same size range and meet the chapter note definition of suits.)

This ruling serves to apply HQ 962125, by determining that the subject track suit components are classifiable within heading 6211 (based on their condition as imported), if they are imported together in equal quantities that are matched by size, and if they are constructed and designed to be used exclusively or mainly for athletic activities.[1]

In this instance, we find the subject track suit components are classifiable in heading 6211, HTSUSA, based on their condition as imported. The modification of the classification of the garments in PC 876238 was based on a change in the intent of the importer. Therefore, we are revoking the reference in HQ 952704 to the intent of the importer as this has no bearing on the classification determination and we are classifying the merchandise based on their condition as imported in heading 6211, HTSUSA, which provides for track suits. For further details, we refer you to HQ 962125, which is enclosed.

HOLDING:

HQ 952704, dated February 1, 1993, is hereby revoked.

The subject trousers are classifiable in subheading 6211.33.0030, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys': Of man-made fibers: Track suits: Trousers." The general column one duty rate is 16.1 percent *ad valorem* and the quota category is 647.

The subject jackets are classifiable in subheading 6211.33.0035, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys': Of man-made fibers: Track suits: Other." The general column one duty rate is 16.1 percent *ad valorem* and the quota category is 634.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the Textile Status Report for Absolute Quotas, previously available on the Customs Electronic Bulletin Board (CEBB), which is available on the CPB website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements

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[1] *See* HQ 962039 dated April 11, 2000 *citing to* HQ 950378, dated April 22, 1993 which classified garments with shoulder pads, metallic yarn and multicolored thread embroidery, metallic braided piping, beads, and textile and plastic overlays as a track suit in heading 6211, HTSUSA.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965933
August 14, 2003
CLA–2 RR:CR:TE 965933 TF
CATEGORY: Classification
TARIFF NO.: 6211.43.0040, 6201.43.0050

MS. SUSAN MORETTI, ATTORNEY IN FACT
TLR-TOTAL LOGISTICS RESOURCE, INC.
P. O. Box 30419,
Portland, OR 97230

RE: Modification of HQ 088423; Classification of unisex jackets and pants as track suits; Imported in equal numbers but separately packed; Classification Based on Condition at the Time of Importation, Classification Based on the Intended Manner of Sale; HQ 962125, dated May 5, 2000

DEAR MS. MORETTI:

Pursuant to your classification requests, Customs issued Headquarters Ruling Letter (HQ) 088423, dated May 20, 1991, to your company. This ruling pertained to the tariff classification of certain unisex jackets and pants as track suits. Upon review, the Bureau of Customs and Border Protection (CBP) has determined that the classification is correct, however the analysis applied to reach the classification determination is incorrect. This ruling letter sets forth the correct classification determination based on the articles' condition as imported rather than the intended manner of sale as represented by the importer.

HQ 088423 is hereby modified for the reasons set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed modification of HQ 088423, dated May 20, 1991 was published on July 2, 2003, in Vol. 37, No. 27 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

The merchandise at issue consists of two combinations of unisex jackets and pants. The first, style Y306 jacket and style Y206 pants, consists of a jacket with a full front opening, a zipper extending to the top of the collar, zippered slant pockets at the waist, elasticized cuffs and waist, and a rear yoke extending more than halfway down the back and covering a mesh liner. The pants have an elasticized waist with no break, side seam pockets, and

zippers extending half way up the leg from the elasticized cuffs. Both garments are constructed of 100% woven nylon. You state that these garments will be manufactured in different companies in Malaysia, then sent to a consolidator for shipment to the United States.

Purchase orders submitted with your request indicate that the tops and bottoms are pre-packed separately in cartons of thirty in equal quantities within the same shipment. The tops and bottoms will be sold as "sets" in the United States.

The second combination, style U900, consists of a jacket with a full front zippered opening, zippered, slant pockets at the waist, elasticized cuffs and waist, a drawstring at the waist, and a rear yoke extending more than half way down the back and covering a mesh liner. The trousers have zippers extending from the cuffs to the waist, have adjustable snap tabs at the waist, and are unlined. They are constructed of 100% woven nylon.

ISSUE:

What is the proper classification of the merchandise within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Woven track suits are provided *eo nomine* in heading 6211, HTSUSA. EN 62.11 states, in pertinent part, that "the provisions of the Explanatory Note to heading 61.12 concerning track suits . . . and of the Explanatory Note to heading 61.14 concerning other garments apply, *mutatis mutandis*, to the articles of this heading." We refer to EN 61.12 which describes track suits as consisting of two garments, namely:

> —A garment meant to cover the upper part of the body down to or slightly below the waist. It has long sleeves, with ribbed or elasticated bands, zip fasteners or other tightening elements at the cuffs. Similar tightening elements, including drawstrings, are generally to be found at the bottom of this garment. When it has a partial or complete opening at the front, it is generally fastened by means of a slide fastener (zipper). It may or may not be fitted with a hood, a collar and pockets.
>
> —A second garment (a pair of trousers) which may be either close or loose fitting, with or without pockets, with an elasticated waistband, drawstring or other means of tightening at the waist, with no opening at the waist and therefore no buttons or other fastening system. However, such trousers may be fitted with ribbed or elasticated bands, slide fasteners (zippers) or other tightening elements at the bottom of the trouser-legs which generally go down to ankle level. They may or may not have footstraps.

Track suits are classifiable based on GRI 1. As such, track suit components that form sets are not required to be "put up for retail sale" under GRI 3(b). In order for the subject track suit components to be classifiable within heading 6211, HTSUSA, as track suits at the time of importation, they should be packed in the same shipment at the time of importation, but not necessarily on the same hanger or in the same container. *See* Headquarters Ruling (HQ) 962125, dated May 5, 2000, referencing the following: Headquarters Memorandum 085944 PR, dated May 10, 1991; HQ 088423, dated May 20, 1991; HQ 952584, dated December 8, 1992; HQ 952907, dated January 29, 1993; HQ 952704, dated February 1, 1993; HQ 953231, dated May 12, 1993; HQ 954270, dated August 17, 1993; HQ 955519, dated April 15, 1994; HQ 956298, dated March 9, 1995.

In this instance, the subject track suit components are shipped in the same shipment, but separately packaged. The subject track suit components are provided *eo nomine* in heading 6211, HTSUSA. Further, we refer you to HQ 962125, dated May 5, 2000, which is listed above. In HQ 962125, Customs expressed the view that classification is based on the merchandise's condition as imported rather than the intent of the importer. Id. (clarifying that matching suit jackets and bottoms are classifiable as suits based on their condition as imported if they are imported in equal numbers in the same size range and meet the chapter note definition of suits.)

This ruling serves to apply HQ 962125, by determining that the subject track suit components are classifiable within heading 6211 (based on their condition as imported), if they are imported together in equal quantities that are matched by size, and if they are constructed and designed to be used exclusively or mainly for athletic activities.[1]

Based on the submitted facts, as the subject track suit components are classifiable in heading 6211, HTSUSA, and since they are shipped together in the same shipment, we find them to be classifiable as track suits. Therefore, we are striking the reference in HQ 088423 to the intent of the importer as this has no bearing on the classification determination and we are classifying the merchandise based on their condition as imported in heading 6211, HTSUSA, which provides for track suits. For further details, we refer you to HQ 962125, which is enclosed.

HOLDING:

HQ 088423, dated May 20, 1991 is hereby modified with regard to the classification based on the intent of the importer.

The matching pants are classifiable in subheading 6211.43.0040, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of man-made fibers: Track suits: Trousers." The general column one duty rate is 16.1 percent *ad valorem* and the quota category is 648.

The matching jackets are classified in subheading 6211.43.0050, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of man-made fibers: Track

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[1] *See* HQ 962039 dated April 11, 2000 *citing to* HQ 950378, dated April 22, 1993 which classified garments with shoulder pads, metallic yarn and multicolored thread embroidery, metallic braided piping, beads, and textile and plastic overlays as a track suit in heading 6211, HTSUSA.

suits: Other." The general column one duty rate is 16.1 percent *ad valorem* and the quota category is 635.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the Textile Status Report for Absolute Quotas, previously available on the Customs Electronic Bulletin Board (CEBB), which is available now on the CPB website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965934
August 14, 2003
CLA–2 RR:CR:TE 965934 TF
CATEGORY: Classification
TARIFF NO.: 6204.11.0000, 6204.31.2010; 6204.51.0010

MR. ROBERT T. STACK
SIEGEL, MANDELL & DAVIDSON, P.C.
One Astor Place
1515 Broadway - 43rd Floor
New York, NY 10036–8901

RE: Modification of NY B83511; Classification of Women's Suits; Separately Packed in Equal Quantities; Classification Based on the Intended Manner of Sale; HQ 962125, dated May 5, 2000

DEAR MR. STACK:

In your letter dated March 20, 1997, you requested a classification ruling on behalf of your client, Liz Claiborne, Inc. In response to your request, Customs issued NY B83511, dated April 23, 1997, which pertains to the tariff classification of certain women's suits.

Upon review, the Bureau of Customs and Border Protection (CBP) has determined that the analysis of NY B83511 is erroneous as the merchandise was classified based on the intent of the importer. This ruling letter sets forth the correct classification determination based on the articles' condition as imported.

NY B83511 is hereby modified for the reasons set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed modification of NY B83511, dated April 23, 1997 was published on July 2, 2003, in Vol. 37, No. 27 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

The facts about the merchandise at issue were taken from NY B83511:

- Style 30750431/30750411 consists of a women's jacket and skirt constructed from 62% wool, 20% rayon, 13% nylon and 5% acetate woven fabric. Both garments are lined with 100 percent acetate woven fabric. The tailored jacket (designated as 30750431) has eight panels, with two of the front panels and two of the back panels extending from the shoulder seam to the bottom of the jacket, while the various side panels extend from the sleeve openings to the bottom of the jacket. The jacket features long sleeves without cuffs, a notched portrait collar, a full front opening with four buttons for closure and two pockets with flaps below the waist. The skirt designated as 30750411, has a zippered rear closure with an inner button tab closure.
- It is your contention that the goods meet the tariff and commercial definition for suits; the garments imported under the combined style 30750431/30750411 are sold together to retailers in matching quantities and are properly dutiable as suits. However, due to innovative retail sale practices, the consumer will be able to match different sizes or purchase garments individually. You suggest that Customs might perceive a problem in classifying the garments as suits under these circumstances. You present the following information concerning the importation of the goods:
    1. The importer is purchasing style 30750431/30750411 as a suit that will be designated by the joint style number on the company's orders and import invoice documentation. The jackets will match the skirts in fabric, size, color and composition. The suits will be imported with each jacket and matching skirt on separate hangers that are attached. Each individual garment will be covered by a polybag and the suit will be covered by another polybag. The hangers for the garments will be detachable.
    2. Style 30750431/30750411, is being sold by the importer as a set of garments to the buyers for retail stores. The buyers are purchasing equal numbers of jackets and skirts, with each jacket and skirt in matching size and color. The importer anticipates that some retailers will hang the garments together in the manner imported, while others will split the jackets and skirts and merchandise them in adjacent displays. The jackets and skirts will be individually ticketed for sale, whether hung together or hung separately.
    3. Although the garments are clearly designed to be worn together, due to the patterning of the fabric design, consumers will be able to purchase jackets and skirts in different sizes for fit consider-

ations, or even as individual pieces. In light of the consumer's ability to match different sizes or purchase one jacket or one skirt individually, certain buyers have indicated a desire to purchase additional quantities of either jackets or skirts. If the importer makes such quantities available separately, this will involve separate purchase orders for the individual pieces, importation of any extra pieces as individual items and sale of the extra garments to the stores as individual pieces not shipped with matching articles.

ISSUE:

What is the proper classification of the merchandise within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Chapter 62 provides for articles of apparel and clothing accessories, not knitted or crocheted. Note 3(a) to Chapter 62, HTSUSA, defines the term "suit" as a set of garments composed of two or three pieces made up, in respect of their outer surface, in identical fabric and comprising:

> —one suit coat or jacket the outer shell of which, exclusive of sleeves, consists of four or more panels, designed to cover the upper part of the body, possibly with a tailored waistcoat in addition whose front is made from the same fabric as the outer surface of the other components of the set and whose back is made from the same fabric as the lining of the suit coat or jacket; and
>
> —one garment designed to cover the lower part of the body and consisting of trousers, breeches or shorts (other than swimwear), a skirt or a divided skirt, having neither braces nor bibs.

All of the suit components must be of the same fabric construction, color and composition; they must also be of the same style and of corresponding or compatible size.

Women's suits are provided *eo nomine* in heading 6204 and are classifiable pursuant to GRI 1, HTSUSA. Unlike "sets", which are provided within GRI 3(b), suits are not required to be "put up for retail sale." Further, Note 3(a) to Chapter 62 does not require that suit components be put up for retail sale. Rather, in order for suit components to be classifiable as suits of heading 6204 (pursuant to Note 3(a)), the suit components are required at the time of importation to be present together in the same shipment in equal amounts, but need not be packed together.

In this instance, although the subject merchandise is imported together on separate hangers with each individual piece covered in polybags, this is

not controlling as the goods meet the terms of Note 3(a) to Chapter 62. Further, Customs has clearly articulated its view of how suits are to be classified in HQ 962125, dated May 5, 2000. In HQ 962125, Customs clarified that when matching suit jackets and bottoms, which meet the chapter note definition of suits are imported in the same shipment (in equal numbers and in the same size range), the garments are to be classified as suits based on their condition as imported. It is also stated that the intent of the importer is irrelevant to the goods' classification.[1]

This ruling serves to apply HQ 962125, by determining that the subject merchandise, when imported together in equal quantities, matched by size and color, meet the tariff definition of suits as provided by Note 3 of Chapter 62 and are classified in heading 6204 as provided by GRI 1. In this case, the equal number of matching suit jackets and skirts are classifiable as suits. Additionally, to the extent that NY B83511 relied on the intent of the importer to classify the goods, we find this ruling to be in error, and we are striking the reference to the intent of the importer in NY B83511 as this has no bearing on the classification determination.

In sum, we are modifying the reference in NY B83511 to the intent of the importer as this has no bearing on the classification determination and we are classifying the merchandise based on their condition as imported in heading 6204, HTSUSA, which provides for women's suits. For further details, we refer you to HQ 962125, which is enclosed.

HOLDING:

NY B83511, dated April 23, 1997 is hereby modified with regard to classification based on the intent of the importer.

In NY B83511, we find the analysis portion that pertains to the classification based on the intent of the importer to be incorrect. Rather the classification analysis should be based upon the merchandise's condition as imported. We refer you to NY B83511 for the appropriate classification within the Tariff.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

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[1] *See* Headquarters Ruling (HQ) 962125, dated May 5, 2000, which refers to C.S.D. 92–11 (which applies the appropriate analysis of classifying suit components) as follows:

> Components of a set need not be packaged together at time of entry in order to be considered classifiable as a set, but all garments must be present in the entry and there must be an equal amount of components to make up the set in the shipment.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965929
August 14, 2003
CLA–2 RR:CR:TE 965929 TF
CATEGORY: Classification
TARIFF NO.: 6211.33.0030, 6211.33.0035, 6201.93.3511

GEORGE R. TUTTLE, P.C.
Three Embarcadero Center, Suite 1160
San Francisco, CA 94111

RE: Revocation of HQ 956298; Protest No. 2809–93–102031; Classification of track suits; Imported in Unequal Numbers but Separately Packed, Invoiced & Entered; Classification Based on Condition at the Time of Importation, Classification Based on the Intended Manner of Sale; HQ 962125

DEAR MR. TUTTLE:

This letter is in reference to Headquarters Ruling Letter (HQ) 956298, dated March 9, 1995, which decided Protest Number 2809–93–102031, dated December 9, 1993, which was initiated by you on behalf of your client, WESOC, Inc., concerning the classification of certain merchandise as jackets and pants as opposed to track suits.

Upon review, the Bureau of Customs and Border Protection (CBP) has determined that the classification is incorrect. This ruling letter sets forth the correct classification determination based on the articles condition as imported rather than the intended manner of sale as represented by the importer.

HQ 956298 is hereby revoked for the reasons set forth below. Although a final determination of a protest pursuant to Customs Regulations cannot be modified or revoked as it is applicable only to the entries protested, this ruling serves to modify the legal principle applied in HQ 956298. Further, this revocation decision will be applicable to any unliquidated entries or future importations of similar merchandise.

FACTS:

The merchandise at issue consists of 2880 warm up pants and 5040 warm up jackets that were packed separately on the same ship and listed on separate entries. The importer claimed that the separate entries were made in error.

The importer further claimed that 2880 pairs of pants should have been classified with 2880 jackets in order to be classified as track suits in subheading 6211.33.0050, HTSUSA, (the jackets) and subheading 6211.33.0040, HTSUSA (the pants).

ISSUE:

What is the proper classification of the merchandise within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined

according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Woven track suits are provided *eo nomine* in heading 6211, HTSUSA. EN 62.11 states, in pertinent part, that "the provisions of the Explanatory Note to heading 61.12 concerning track suits . . . and of the Explanatory Note to heading 61.14 concerning other garments apply, *mutatis mutandis*, to the articles of this heading." We refer to EN 61.12 which describes track suits as consisting of two garments, namely:

> —A garment meant to cover the upper part of the body down to or slightly below the waist. It has long sleeves, with ribbed or elasticated bands, zip fasteners or other tightening elements at the cuffs. Similar tightening elements, including drawstrings, are generally to be found at the bottom of this garment. When it has a partial or complete opening at the front, it is generally fastened by means of a slide fastener (zipper). It may or may not be fitted with a hood, a collar and pockets.
>
> —A second garment (a pair of trousers) which may be either close or loose fitting, with or without pockets, with an elasticated waistband, drawstring or other means of tightening at the waist, with no opening at the waist and therefore no buttons or other fastening system. However, such trousers may be fitted with ribbed or elasticated bands, slide fasteners (zippers) or other tightening elements at the bottom of the trouser-legs which generally go down to ankle level. They may or may not have footstraps.

Track suits are classifiable based on GRI 1. As such, track suit components that form sets are not required to be "put up for retail sale" under GRI 3(b). In order for the subject track suit components to be classifiable within heading 6211, HTSUSA, they should be packed in the same shipment at the time of importation, but not necessarily on the same hanger or in the same container. *See* Headquarters Ruling (HQ) 962125, dated May 5, 2000, referencing the following: Headquarters Memorandum 085944 PR, dated May 10, 1991; HQ 088423, dated May 20, 1991; HQ 952584, dated December 8, 1992; HQ 952907, dated January 29, 1993; HQ 952704, dated February 1, 1993; HQ 953231, dated May 12, 1993; HQ 954270, dated August 17, 1993; HQ 955519, dated April 15, 1994; HQ 956298, dated March 9, 1995.

In this instance, 2880 track suit pants and 2880 track suit jackets were entered in the same shipment. The remaining 2160 track suit jackets were also entered from the same shipment without matching pants. We refer you to HQ 962125, dated May 5, 2000, which is listed above. In HQ 962125, Customs expressed the view that classification is based on the merchandise's condition as imported rather than the intent of the importer. Id. (clarifying that matching suit jackets and bottoms are classifiable as suits based on

their condition as imported if they are imported in equal numbers in the same size range and meet the chapter note definition of suits.)[1]

This ruling serves to apply HQ 962125, by determining that the subject track suit components are classifiable within heading 6211 (based on their condition as imported), if they are imported together in equal quantities that are matched by size, and if they are constructed and designed to be used exclusively or mainly for athletic activities.[2]

Based on the submitted facts, as the subject track suit components are shipped together in the same shipment, we find an equal number of pants and jackets are classifiable as track suits as follows:

- 2880 of the subject trousers are classifiable in subheading 6211.33.0030, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys': Of man-made fibers: Track suits: Trousers."
- 2880 of the subject jackets are classified in subheading 6211.33.0035, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys': Of man-made fibers: Track suits: Other."

The remaining track suit jackets are classified separately as entered in subheading 6201.93.3511, HTSUSA, which provides in general for men's outwear jackets.

In sum, we are striking the reference in HQ 956298 to the intent of the importer as this has no bearing on the classification determination and we are classifying the merchandise based on its condition as imported. For further details, we refer you to HQ 962125, which is enclosed.

HOLDING:

HQ 956298, dated March 9, 1995, is hereby revoked.

The matching track suit pants and jackets (which are entered in equal quantities) are classifiable as tracksuits. The matching pants are classifiable in subheading 6211.33.0030, HTSUSA, which provides for "Track suits,

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[1] It is also stated that the intent of the importer is irrelevant to the classification of the goods. *See* Headquarters Ruling (HQ) 962125, referring to C.S.D. 92–11 (which applies the appropriate analysis of classifying track suit components) as follows:

> Components of a set need not be packaged together at time of entry in order to be considered classifiable as a set, but all garments must be present in the entry and there must be an equal amount of components to make up the set in the shipment. Therefore, if the instant goods contained the general characteristics of a track suit and were not coated, the classification outcome would be as follows: . . . if the goods were shipped separately on different vessels, they would not be classifiable as a set; if the instant goods were shipped on the same vessel, listed on the entry, and not packaged as a set, with an equal amount of trousers and jackets, they would be classifiable as a set; and, if the instant goods were shipped on the same vessel, listed on the entry, packaged separately, with an unequal amount of trousers and jackets, the extra components would be classifiable as separates. This rationale is premised on the fact that the EN require two garments to make up a track suit. Therefore, in the case of unequal shipments, the extra components are classifiable separately because it takes two components to make a track suit. In the case of shipments of one component, the lone component is not classifiable as a track suit.

[2] *See* HQ 962039 dated April 11, 2000 *citing to* HQ 950378, dated April 22, 1993, which classified garments with shoulder pads, metallic yarn and multicolored thread embroidery, metallic braided piping, beads, and textile and plastic overlays as a track suit in heading 6211, HTSUSA.

ski-suits and swimwear; other garments: Other garments, men's or boys': Of man-made fibers: Track suits: Trousers."

The matching jackets are classified in subheading 6211.33.0035, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys': Of man-made fibers: Track suits: Other."

The remaining jackets which lack matching pants are classified separately as entered in subheading 6201.93.3511, HTSUSA, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets) windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Other, Men's."

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965930
August 14, 2003
CLA–2 RR:CR:TE 965930 TF
CATEGORY: Classification
TARIFF NO.: 6211.33.0030; 6211.33.0035; 6203.43.4010

JOHN A. BESSICH, ESQ.
FOLLICK & BESSICH, P.C.
33 Walt Whitman Road, Suite 204,
Huntington Station, New York 11746

RE: Modification of HQ 955519; Classification of men's anorak jackets and pants as separates; Imported in unequal numbers in separate shipments over time; Classification Based on the Intended Manner of Sale; Classification based on condition as imported; HQ 962125

DEAR MR. BESSICH:

This letter is in reference to Headquarters Ruling Letter (HQ) 955519, dated April 15, 1994, which decided Protest Number 1803–92–100022, dated March 27, 1992, which was initiated by you concerning the classification of certain merchandise as jackets and pants as opposed to as track suits.

In HQ 955519, one entry of separates which contained an uneven number of men's anorak jackets and pants, designated as style 2204J (200) and style 2204P (1576) was classified separately as jackets and pants by Customs. Upon review, the Bureau of Customs and Border Protection has determined that entry at issue was erroneously classified based on the intended manner of sale as represented by the importer, rather than the condition of the merchandise as imported.

We have reviewed the classification decision with regard to the respective entry referenced above and determined that the conclusion in HQ 955519 concerning that entry was incorrect. Although, a final determination of a protest, pursuant to Customs Regulations, cannot be modified or revoked as it is applicable only to the entry protested, this ruling serves to change the legal principle as applied to the one entry identified in HQ 955519. Further, this modification decision will be applicable to any unliquidated entries or future importations of similar merchandise.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed modification of HQ 955519 dated April 15, 1994, was published on July 2, 2003, in Vol. 37, No. 27 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

The entry at issue was composed of an uneven number of jackets and pants (200 jackets, 1576 pants), designated as styles 2204J (200) and style 2204P (1576).

The facts of HQ 955519 describes the merchandise as follows:

- The jacket is constructed of a 100 percent nylon woven fabric outershell, a 65 percent polyester/35 percent cotton knit jersey fabric lining in the body of the garment, and a 100 percent nylon woven fabric lining in the arms. The garment features long sleeves with elasticized cuffs, a 2-1/2 inch wide elasticized waistband, a full frontal opening secured by a zipper closure which extends to the end of the collar, a stand-up collar, and two front pockets at the waist.
- The pants of style 2204 are constructed of a 100 percent nylon woven fabric outershell, a 65 percent polyester/35 percent cotton knit jersey fabric lining for the torso portion of the pants extending slightly down the legs portion, and a 100 percent nylon woven fabric lining the remaining legs portion of the pants. The pants feature an elasticized waistband with an enclosed drawstring for tightening, a zippered fly that does not extend through the waistband, and elasticized ankle cuffs with side zippers which extend about 9 inches up the outside of the legs.
- The garments are color coordinated and each feature matching embroidered logos of a major league sports franchise.

The entry at issue was the subject of HQ 955519, dated April 15, 1994, which was an Application for Further Review of Protest No. 1803–92–100022 and 1803–92–100011. It was also the subject of two previous preclassification rulings—PC 868293 of November 26, 1991, and PC 873396 of May 4, 1992.

PC 868293 classified the jacket and pants (designated as style 2204) as track suits components in subheadings 6211.33.0030, HTSUSA, and 6211.33.0035, HTSUSA); and if imported separately as water resistant garments in subheadings 6201.93.3000, HTSUSA, and 6203.43.3500, HTSUSA. In PC 873396, Customs classified the goods in subheadings 6201.93.3000, HTSUSA, and 6203.43.3500, HTSUSA, respectively. PC 873396 indicated the garments were imported separately.

In HQ 955519, Customs denied the protest and classified the entry at issue based upon the intent of the importer in accordance with the pre-classification ruling, which was as separates.

ISSUE:

What is the proper classification of the merchandise within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Woven track suits are provided *eo nomine* in heading 6211, HTSUSA. EN 62.11 states, in pertinent part, that "the provisions of the Explanatory Note to heading 61.12 concerning track suits . . . and of the Explanatory Note to heading 61.14 concerning other garments apply, *mutatis mutandis*, to the articles of this heading." We refer to EN 61.12 which describes track suits as consisting of two garments, namely:

> —A garment meant to cover the upper part of the body down to or slightly below the waist. It has long sleeves, with ribbed or elasticated bands, zip fasteners or other tightening elements at the cuffs. Similar tightening elements, including drawstrings, are generally to be found at the bottom of this garment. When it has a partial or complete opening at the front, it is generally fastened by means of a slide fastener (zipper). It may or may not be fitted with a hood, a collar and pockets.
>
> —A second garment (a pair of trousers) which may be either close or loose fitting, with or without pockets, with an elasticated waistband, drawstring or other means of tightening at the waist, with no opening at the waist and therefore no buttons or other fastening system. However, such trousers may be fitted with ribbed or elasticated bands, slide fasteners (zippers) or other tightening elements at the bottom of the trouser-legs which generally go down to ankle level. They may or may not have footstraps.

Track suits are classifiable in heading 6211 based on GRI 1. As such, track suit components that form sets are not required to be "put up for retail sale" under GRI 3(b). In order for the subject track suit components to be classifiable within heading 6211, HTSUSA, as track suits at the time of importation, they should be packed in the same shipment at the time of importation, but not necessarily on the same hanger or in the same container. *See* Headquarters Ruling (HQ) 962125, dated May 5, 2000, referencing the following: Headquarters Memorandum 085944 PR, dated May 10, 1991; HQ 088423, dated May 20, 1991; HQ 952584, dated December 8, 1992; HQ 952907, dated January 29, 1993; HQ 952704, dated February 1, 1993; HQ 953231, dated

May 12, 1993; HQ 954270, dated August 17, 1993; HQ 955519, dated April 15, 1994; HQ 956298, dated March 9, 1995.

Further, we refer you to HQ 962125, dated May 5, 2000, which is listed above. In HQ 962125, Customs expressed the view that classification is based on the merchandise's condition as imported rather than the intent of the importer. Id. (clarifying that matching suit jackets and bottoms are classifiable as suits based on their condition as imported if they are imported in equal numbers in the same size range and meet the chapter note definition of suits.)[1]

This ruling serves to apply HQ 962125, by determining that the subject track suit components are classifiable within heading 6211 (based on their condition as imported), if they are imported together in equal quantities that are matched by size, and if they are constructed and designed to be used exclusively or mainly for athletic activities.[2]

In HQ 955519, the merchandise was entered in four separate entries spanning a time period of approximately six weeks. Of those four separate entries, one entry contained 200 jackets and 1576 pairs of trousers that were entered in the same shipment and classified as separates. We find 200 jackets and 200 pairs of trousers to be classified as track suit components which are provided *eo nomine* in heading 6211, HTSUSA. For this one entry, we find the equal number of trousers and jackets are classifiable as track suits with the remaining trousers that do not have matching jackets to be separately classifiable.

We are modifying HQ 955519 in part with regard to the one entry of unequal number of pants and jackets and we are classifying the one entry at issue based on its condition as follows:

- 200 of the subject trousers are classifiable in subheading 6211.33.0030, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys: Of man-made fibers: Track suits: Trousers."

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[1] It is also stated that the intent of the importer is not irrelevant to the classification. *See* Headquarters Ruling (HQ) 962125, referring to C.S.D. 92–11 (which applies the appropriate analysis of classifying track suit components) as follows:

> Components of a set need not be packaged together at time of entry in order to be considered classifiable as a set, but all garments must be present in the entry and there must be an equal amount of components to make up the set in the shipment. Therefore, if the instant goods contained the general characteristics of a track suit and were not coated, the classification outcome would be as follows: . . . **if the goods were shipped separately on different vessels, they would not be classifiable as a set; if the instant goods were shipped on the same vessel, listed on the entry, and not packaged as a set, with an equal amount of trousers and jackets, they would be classifiable as a set** [*emphasis added*]; and if **the instant goods were shipped on the same vessel, listed on the entry, packaged separately, with an unequal amount of trousers and jackets, the extra components would be classifiable as separates** [*emphasis added*]. This rationale is premised on the fact that the EN require two garments to make up a track suit. Therefore, in the case of unequal shipments, the extra components are classifiable separately because it takes two components to make a track suit. In the case of shipments of one component, the lone component is not classifiable as a track suit.

[2] *See* HQ 962039 dated April 11, 2000 *citing to* HQ 950378, dated April 22, 1993 which classified garments with shoulder pads, metallic yarn and multicolored thread embroidery, metallic braided piping, beads, and textile and plastic overlays as a track suit in heading 6211, HTSUSA.

- 200 of the subject jackets are classified in subheading 6211.33.0035, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys: Of man-made fibers: Track suits: Other."
- The remaining trousers are classifiable as originally liquidated, which is in subheading 6203.43.4010, HTSUSA, which provides for "Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Trousers, bib and brace overalls, breeches and shorts: Of synthetic fibers: Other: Other: Other: Other: Other: Trousers and breeches: Men's."

For further details, we refer you to HQ 962125, which is enclosed.

HOLDING:

With respect to the one entry which contained an uneven number of jackets and pants (200 jackets, 1576 pants), HQ 955519, dated April 15, 1994, is hereby modified.

The merchandise presented in the entry is classifiable as:

- 200 of the subject trousers are classifiable in subheading 6211.33.0030, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys: Of man-made fibers: Track suits: Trousers."
- 200 of the subject jackets are classified in subheading 6211.33.0035, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys: Of man-made fibers: Track suits: Other."
- The remaining trousers are classifiable as originally liquidated, which is in subheading 6203.43.4010, HTSUSA, which provides for "Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear: Trousers, bib and brace overalls, breeches and shorts: Of synthetic fibers: Other: Other: Other: Other: Other: Trousers and breeches: Men's."

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965931
August 14, 2003
CLA–2 RR:CR:TE 965931 TF
CATEGORY: Classification
TARIFF NO.: 6211.33.0030; 6211.33.0035

STEVEN P. FLORSHEIM, ESQ.
GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT LLP
245 Park Avenue
33rd Floor
New York, NY 10167

RE: Revocation of HQ 953231; Classification of Certain Jackets and Trousers as Track Suits; Imported in Equal Numbers; Classification Based on Condition at the Time of Importation, Classification Based on the Intended Manner of Sale; HQ 962125

DEAR MR. FLORSHEIM:

This letter is in reference to Headquarters Ruling Letter (HQ) 953231, dated May 12, 1993, which decided Protest Number 2704–92–100134, dated January 8, 1992, which was initiated by you on behalf of your client, Etonic, Inc.-Puma Division, concerning the classification of certain merchandise as separates as opposed to as track suits.

Upon review, the Bureau of Customs and Border Protection (CBP) has determined that the classification is incorrect.

HQ 953231 is hereby revoked for the reasons set forth below. Although a final determination of a protest pursuant to Customs Regulations cannot be modified or revoked as it is applicable only to the entries protested, this ruling serves to change the legal principle applied in HQ 953231. Further, this revocation decision will be applicable to any unliquidated entries or future importations of similar merchandise.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed revocation of HQ 953231, dated May 12, 1993 was published on July 2, 2003, in Vol. 37, No. 27 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

The merchandise at issue in HQ 953231, dated May 12, 1993, is described as follows:

- The imported merchandise consists of two styles of men's jackets and one style of men's trousers. Both the jackets, style "Venus–M–1" (Venus) and "Saturn M–32" (Saturn), are made of a woven nylon fabric and are lined. They have a full front opening, a zipper extending to the top of a stand up collar, back vertical vents, a pocket below the waistline and an embroidered logo. The color pattern for the Venus style is spruce/marigold/ peacock and the color pattern for the Saturn style is spruce/peacock/marigold.

- The trousers, "Pluto M–105" (Pluto), are also made of woven nylon fabric. They have an exposed elastic drawcord waist, zippered leg openings, a pocket below the waistline, side seam pockets and an embroidered logo. The trousers are unlined. The color of the trousers is spruce.
- 2400 jackets and 2400 trousers were imported in a single shipment, but they were packed separately. The breakdown of garment styles and sizes is a follows:

	Small	Medium	Large	X-Large
Venus Jacket	98	360	468	266
Saturn Jacket	96	360	488	264
Pluto Trousers	276	792	883	449

- In addition, the protestant submitted a page from the Puma catalogue depicting the Venus jacket and the Pluto pants. It states that the sizes available for the jacket range from S–XL and the jacket's wholesale price is $22.00 and the suggested retail price is $44.00. The trousers' size range from S–XL and the wholesale price is $13.50 and the suggested retail price is $27.00.
- Upon liquidation, the jackets were classified in subheading 6201.93.3510, HTSUS, which provides for "[m]en's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: [a]noraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets): [o]f manmade fibers: [o]ther: [o]ther: [o]ther: [o]ther: [m]en's." The trousers were classified in subheading 6203.43.4010, HTSUS, which provides for "[m]en's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear): [t]rousers . . . : [o]f synthetic fibers: [o]ther: [o]ther: [o]ther: [o]ther: [o]ther: [t]rousers and breeches [m]en's."

ISSUE:

What is the proper classification of the merchandise within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Woven track suits are provided *eo nomine* in heading 6211, HTSUSA. EN 62.11 states, in pertinent part, that "the provisions of the Explanatory Note to heading 61.12 concerning track suits . . . and of the Explanatory Note to heading 61.14 concerning other garments apply, *mutatis mutandis*, to the

articles of this heading." We refer to EN 61.12 which describes track suits as consisting of two garments, namely:

> —A garment meant to cover the upper part of the body down to or slightly below the waist. It has long sleeves, with ribbed or elasticated bands, zip fasteners or other tightening elements at the cuffs. Similar tightening elements, including drawstrings, are generally to be found at the bottom of this garment. When it has a partial or complete opening at the front, it is generally fastened by means of a slide fastener (zipper). It may or may not be fitted with a hood, a collar and pockets.
>
> —A second garment (a pair of trousers) which may be either close or loose fitting, with or without pockets, with an elasticated waistband, drawstring or other means of tightening at the waist, with no opening at the waist and therefore no buttons or other fastening system. However, such trousers may be fitted with ribbed or elasticated bands, slide fasteners (zippers) or other tightening elements at the bottom of the trouser-legs which generally go down to ankle level. They may or may not have footstraps.

Track suits are classifiable based on GRI 1. As such, track suit components that form sets are not required to be "put up for retail sale" under GRI 3(b). In order for the subject track suit components to be classifiable within heading 6211, HTSUSA, they should be packed in the same shipment at the time of importation, but not necessarily on the same hanger or in the same container. See Headquarters Ruling (HQ) 962125, dated May 5, 2000, referencing the following: Headquarters Memorandum 085944 PR, dated May 10, 1991; HQ 088423, dated May 20, 1991; HQ 952584, dated December 8, 1992; HQ 952907, dated January 29, 1993; HQ 952704, dated February 1, 1993; HQ 953231, dated May 12, 1993; HQ 954270, dated August 17, 1993; HQ 955519, dated April 15, 1994; HQ 956298, dated March 9, 1995.

In this instance, 2400 track suit trousers and 2400 track suit jackets were separately packed and entered within the same shipment. Further, we refer you to HQ 962125, dated May 5, 2000, which is listed above. In HQ 962125, Customs expressed the view that classification is based on the merchandise's condition as imported rather than the intent of the importer. Id. (clarifying that matching suit jackets and bottoms are classifiable as suits based on their condition as imported if they are imported in equal numbers in the same size range and meet the chapter note definition of suits.)[1]

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[1] It is also stated that the intent of the importer is irrelevant to the classification of the goods. *See* Headquarters Ruling (HQ) 962125, referring to C.S.D. 92–11 (which applies the appropriate analysis of classifying track suit components) as follows:

> Components of a set need not be packaged together at time of entry in order to be considered classifiable as a set, but all garments must be present in the entry and there must be an equal amount of components to make up the set in the shipment. Therefore, if the instant goods contained the general characteristics of a track suit and were not coated, the classification outcome would be as follows: . . . if the goods were shipped separately on different vessels, they would not be classifiable as a set; if the instant goods were shipped on the same vessel, listed on the entry, and not packaged as a set, with an equal amount of trousers and jackets, they would be classifiable as a set; and, if the instant goods were shipped on the same vessel, listed on the entry, packaged separately, with an unequal amount of trousers and jackets, the extra components would be classifiable as separates. This rationale is premised on the fact that the EN require two garments to make up a track suit. Therefore, in the case of unequal shipments, the extra components

This ruling serves to apply HQ 962125, by determining that the subject track suit components are classifiable within heading 6211 (based on their condition as imported), if they are imported together in equal quantities that are matched by size, and if they are constructed and designed to be used exclusively or mainly for athletic activities.[2]

Based on the submitted facts, as the subject track suit components are classifiable in heading 6211, HTSUSA, and are shipped together in the same shipment, we find the subject merchandise to be classifiable as track suits as follows:

- 2400 of the subject trousers are classifiable in subheading 6211.33.0030, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys': Of man-made fibers: Track suits: Trousers";
- 2400 of the subject jackets are classified in subheading 6211.33.0035, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys': Of man-made fibers: Track suits: Other."

In sum, we are striking the reference in HQ 953231 to the intent of the importer as this has no bearing on the classification determination and we are classifying the merchandise based on their condition as imported in heading 6211, HTSUSA, which provides for track suits. For further details, we refer you to HQ 962125, which is enclosed.

HOLDING:

HQ 965931, dated May 19, 1993 is hereby revoked.

The matching track suit pants and jackets (which are entered in equal quantities) are classifiable as tracksuits. The matching pants are classifiable in subheading 6211.33.0030, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys': Of man-made fibers: Track suits: Trousers."

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

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are classifiable separately because it takes two components to make a track suit. In the case of shipments of one component, the lone component is not classifiable as a track suit.

[2] *See* HQ 962039 dated April 11, 2000 *citing to* HQ 950378, dated April 22, 1993 which classified garments with shoulder pads, metallic yarn and multicolored thread embroidery, metallic braided piping, beads, and textile and plastic overlays as a track suit in heading 6211, HTSUSA.

[ATTACHMENT H]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965935
August 14, 2003
CLA–2 RR:CR:TE 965935 TF
CATEGORY: Classification
TARIFF NO.: 6204.11.0000, 6204.31.2010

MR. JONATHAN FEE
ALSTON AND BYRD, LLP
601 Pennsylvania Avenue, NW
North Building, 10th Floor
Washington, DC 20004–2601

RE: Modification of NY A87564; Classification of Women's Suits; Separately Packed in Equal Quantities; Classification Based on the Intended Manner of Sale; HQ 962125, dated May 5, 2000

DEAR MR. FEE:

In your letter dated September 7, 1996, you requested a classification ruling on behalf of your client, SAG Harbor Division of Kellwood Company. In response to your request, Customs issued NY A87564, dated October 10, 1996, which pertains to the tariff classification of certain women's suits.

Upon review, the Bureau of Customs and Border Protection (CBP) has determined that the analysis of NY A87564 is erroneous as the merchandise was erroneously classified based on the intent of the importer. This ruling letter sets forth the correct classification determination based on the articles' condition as imported.

NY A87564 is hereby modified for the reasons set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed modification of NY A87564 dated October 10, 1996 was published on July 2, 2003, in Vol. 37, No. 27 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

The facts below about the merchandise at issue were taken from NY A87564.

Style 122 consists of a women's jacket and shorts constructed from 100 percent wool. Both garments are lined with 100 percent polyester woven fabric. The double-breasted jacket has four panels and features long sleeves, a notched collar, and two besom pockets below the waist. The shorts have a pleated front, a zippered fly and button closure and side pockets. The waistband is partially elasticized at the rear and contains four belt loops.

It is your contention that the goods meet the tariff and commercial definition for suits. However, due to the innovative retail sale practices employed by the importer, you suggest that Customs might perceive a problem in classifying the garments as suits. You presented the following information concerning the importation of the goods:

- PACKING and SHIPPING: The garments will be shipped to the United States on hangers. The jacket and hanger will be covered by a plastic bag; the shorts will be covered by a separate plastic bag on another hanger; the two components will be covered by a third polybag and connected with a plastic tie. Nearly all import shipments will contain an equal number of upper and lower body garments packaged together as suits in the manner previously described. Occasionally, a shipment may include a small number of additional jackets without matching bottoms. It is the importer's understanding and intent that those pieces which do not meet the definition of a suit (i.e. a set of two garments) will be entered as separates.
- DOCUMENTATION: The importer's purchase orders will refer to this combination of garments as a "suit" and will identify one style designation, 122. In addition, each component will have its own style number, the jacket, style 8505 and the shorts, style 8503. These designations will also appear on the invoices furnished by the foreign suppliers.
- LABELING: Each component will be individually marked with the country of origin and the required info under TFPIA. The garments will also be marked with the component style number. Fewer than half of all shipments will be preticketed with retail sales and other retail information at the request of the importer's customers.
- INTENT: The importer will sell the "suits" to its customers, although the documents will indicate the separate style numbers. You state that nearly all shipments to customers will be of an equal number of top and bottoms, in corresponding size scales, so that they can be sold and worn as suits. The importer intends that the jackets and bottoms are of the same color and size, and worn together. Sometimes a jacket of one size might be matched with a skirt or pant of another size to achieve optimal fit. A customer will rarely buy only one component.
- ADVERTISING: The importer's customers will advertise the articles as suits (Exhibit A). Although separate prices are shown, the advertising shows the garments being worn together.
- DISPLAY: The merchandise will be displayed together on double rack systems or rounders. Exhibit B shows this grouping of garments grouped by size or color. Although the garments are designed and intended to be worn as suits, the jacket and shorts will rarely if ever be placed together on a single hanger. This is because a consumer may choose to buy a jacket in one size and a bottom in another size to achieve an optimal fit.
- Both garments in this case are constructed from identical woven fabric and color, and they are of the same composition.

ISSUE:

What is the proper classification of the merchandise within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined

according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Chapter 62 provides for articles of apparel and clothing accessories, not knitted or crocheted. Note 3(a) to Chapter 62, HTSUSA, defines the term "suit" as a set of garments composed of two or three pieces made up, in respect of their outer surface, in identical fabric and comprising:

> —one suit coat or jacket the outer shell of which, exclusive of sleeves, consists of four or more panels, designed to cover the upper part of the body, possibly with a tailored waistcoat in addition whose front is made from the same fabric as the outer surface of the other components of the set and whose back is made from the same fabric as the lining of the suit coat or jacket; and
>
> —one garment designed to cover the lower part of the body and consisting of trousers, breeches or shorts (other than swimwear), a skirt or a divided skirt, having neither braces nor bibs.

All of the suit components must be of the same fabric construction, color and composition; they must also be of the same style and of corresponding or compatible size.

Women's suits are provided *eo nomine* in heading 6204 and are classifiable pursuant to GRI 1, HTSUSA. Unlike "sets", which are provided within GRI 3(b), suits are not required to be "put up for retail sale." Further, Note 3(a) to Chapter 62 does not require that suit components be put up for retail sale. Rather, in order for suit components to be classifiable as suits of heading 6204 (pursuant to Note 3(a)), the suit components are required at the time of importation to be present together in the same shipment in equal amounts, but need not be packed together.

Customs has clearly articulated its view of how suits are to be classified in HQ 962125, dated May 5, 2000. In HQ 962125, Customs clarified that when matching suit jackets and bottoms, which meet the chapter note definition of suits are imported in the same shipment (in equal numbers and in the same size range), the garments are to be classified as suits based on condition as imported. It is also stated that the intent of the importer is irrelevant to the classification of the goods.[1]

Thus, in this instance, the subject merchandise, identified as style 122 (which is composed of a jacket (style 8505) and a pair of shorts (style 8503)), is imported on hangers with each article individually covered by polybags and connected by plastic ties. However, we do not find the individualized

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[1] *See* Headquarters Ruling (HQ) 962125, dated May 5, 2000, which refers to C.S.D. 92–11 (which applies the appropriate analysis of classifying suit components) as follows:

> Components of a set need not be packaged together at time of entry in order to be considered classifiable as a set, but all garments must be present in the entry and there must be an equal amount of components to make up the set in the shipment.

packaging of the goods to be controlling with respect to whether the subject merchandise is a suit because style 122 clearly meets the terms of Note 3(a) to Chapter 62.

Further, this ruling serves to apply HQ 962125, by determining that the subject merchandise, when imported together in equal quantities, matched by size and color, meet the tariff definition of suits as provided by Note 3 of Chapter 62 and are classified in heading 6204 as provided by GRI 1. In this case, the equal number of matching suit jackets and shorts are classifiable as suits. Additionally, to the extent NY A87564 relied on the intent of the importer to classify the goods, we find this ruling to be in error. Therefore, we are striking the reference to the intent of the importer in NY A87564 as this has no bearing on the classification determination.

In sum, we are classifying the equal numbers of the matching jackets and matching short bottoms on the basis of their condition as imported, which is as women's suits in subheading 6204.11.0000, HTSUSA, which provides *eo nomine* for "women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Suits: Of wool or fine animal hair."

Where the occasion arises whereby a shipment contains a small number of additional jackets without matching bottoms, these jackets are classifiable within subheading 6204.31.2010, HTSUSA, which provides for "Women's or Girls' . . . Suit-type jackets and blazers . . . Of wool or fine animal hair: Other: Women's."

For further details, we refer you to HQ 962125, which is enclosed.

HOLDING:

NY A87564, dated October 10, 1996 is hereby modified.

The matching jackets and matching shorts are classified within subheading 6204.11.0000, HTSUSA, which provides *eo nomine* for "women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Suits: Of wool or fine animal hair." The general column one duty rate is 14.3 percent *ad valorem* and the quota category is 444.

The separately imported jackets (without matching shorts) are classified within subheading 6204.31.2010, HTSUSA, which provides for "Women's or Girls' . . . suit-type jackets and blazers . . . Of wool or fine animal hair: Other: Women's." The general column one duty rate is 4.6% cents/kg + 17.8 percent *ad valorem* and the quota category is 444.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the Textile Status Report for Absolute Quotas, previously available on the Customs Electronic Bulletin Board (CEBB), which is available now on the CPB website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT I]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965927
August 14, 2003
CLA–2 RR:CR:TE 965927 TF
CATEGORY: Classification
TARIFF NO.: 6112.41.0010

JAMES F. O'HARA, ESQ.
STEIN SHOSTAK SHOSTAK & O'HARA
3580 Wilshire Boulevard
Los Angeles, CA 90010–2597

RE: Modification of HQ 952584; Classification of Women's Swimwear; Tops and Bottoms Imported Together but Separately Packaged in Identical Quantities; Classification Based on Condition at the Time of Importation; Classification Based on the Intent of Importer; HQ 962125; HQ 965497

DEAR MR. O'HARA:

Pursuant to your classification request, on behalf of your client, Krystal K. International Inc., concerning certain styles of women's two-piece bikini swimwear, Customs issued Headquarters Ruling Letter (HQ) 952584, dated December 8, 1992, to your firm. This ruling classified the merchandise in subheading 6112.41.0010, HTSUSA, which provides for women's knit swimwear of synthetic fibers, of fabric containing by weight 5 percent or more elastomeric yarn or rubber thread.

Upon review, the Bureau of Customs Border and Protection has determined that the classification is correct, however the analysis applied to reach the classification determination is incorrect. This ruling letter sets forth the correct classification determination based on the articles condition as imported rather than the intent of the importer.

HQ 952584 is hereby modified for the reasons set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed modification of HQ 952584, dated December 8, 1992 was published on July 2, 2003, in Vol. 37, No. 27 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

The subject swimwear consist of two-piece bikini swimsuits that are composed of 83 percent nylon and 17 percent spandex knit fabric. The outer

shell of one piece is either the same color and pattern, or of a coordinated color and pattern, as a matching second piece. The swimsuits will be imported with the tops and bottoms separately packaged, but in identical quantities of coordinated tops and bottoms that will be sold as sets.

The three sample bottom pieces, designated with a (B) in the model number, are composed of knit nylon and spandex with a polyester lined front panel and crotch. The three sample top pieces, designated with a (T) in the model number, are also composed of nylon and spandex and have a front panel that covers the bosom. All are secured in the back with a one-inch square, clear, plastic fastener.

The three sample sets are as follows:

1. Model LS(B)000 and Model LS(T)000: the top is designed in a bandeau style.
2. Model LS(B)001 and Model LS(T)001: the bottom piece is decorated with a ruffled panel of nylon and spandex; the top piece is a short crop tank-top style with lace-up detailing in the front.
3. Model LS(B)002 and Model LS(T)002: the top is designed in a bandeau style.

ISSUE:

What is the proper classification of the merchandise within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 6112, HTSUSA, provides *eo nomine* for swimwear. The EN to heading 6112 states that the heading includes, "Swimwear (knitted or crocheted one-piece or two-piece bathing costumes, swimming shorts and trunks, whether or not elastic)." The EN to heading 6112 specifically references "one-piece or two-piece bathing costumes."

The issue in this case is whether the classification of the submitted bikinis which are separately packaged in identical quantities of coordinated tops and bottoms, is based on the intent of the importer. With regard to whether the intent of the importer is controlling in classifying swimwear merchandise, we note that in HQ 952584, Customs stated that when sets of garments are not packed together in a manner that clearly identifies them as suits at the time of importation, the classification is based on the bona fide intent of the importer. However, since the issuance of HQ 952584, Customs has revisited this matter in HQ 962125, dated May 5, 2000, and clarified its

position by stating that the intent of the importer is not determinative of classification, the condition as imported is.[1]

In this instance, the subject bikinis are separately packaged in identical quantities of coordinated tops and bottoms to be sold as sets. The classification of bikini merchandise was addressed in HQ 965497, dated April 6, 2002, in which Customs considered whether the EN's specific reference to "one-piece or two-piece bathing costumes" requires that both pieces are imported together. In reaching its determination, Customs ruled that "two-piece bathing costumes", such as bikinis, are provided for under heading 6112, HTSUSA, as GRI 1 sets. It was also determined that subheading 6112.41, HTSUSA, which provides for "women's or girls' swimwear", is sufficiently broad to encompass one piece of a two-piece bathing costume. Id.[2] Thus, Customs logically concluded that where separately packaged swimwear tops and bottoms are imported in unequal quantities, any "extra" tops or bottoms are also classified as swimwear of heading 6112, HTSUSA. Id.

This ruling serves to apply HQ 962125 to the classification of the subject bikinis by determining that the merchandise is classifiable (based on condition as imported) in heading 6112, HTSUSA, which provides for women's swimwear, so long as they are imported together in equal quantities that are coordinated and matched by size, and constructed and designed to be used exclusively or mainly for swimming.

Therefore, to the extent that HQ 952584 relied on the intent of the importer to classify the goods, we find the ruling to be in error and are striking the reference to the intent of the importer in HQ 952584 as this has no bearing on the classification determination.

In sum, we are classifying the identical numbers of the coordinated swimsuit tops and bottoms on the basis of their condition as imported, which is swimwear of heading 6112, HTSUSA.

HOLDING:

HQ 952584, dated December 8, 1992, is hereby modified.

The subject tops and bottoms of the bikini swimsuits are classifiable in subheading 6112.41.0010, HTSUSA, as "women's . . . swimwear, of synthetic fibers, of fabric containing by weight 5 percent or more elastomeric yarn or rubber thread." The applicable general column one rate of duty is 25.1 percent *ad valorem* and the quota category is 659.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest your client

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[1] *See* Headquarters Ruling (HQ) 962125, dated May 5, 2000, which refers to C.S.D. 92–11 (which applies the appropriate analysis of classifying suit components) as follows:

> Components of a set need not be packaged together at time of entry in order to be considered classifiable as a set, but all garments must be present in the entry and there must be an equal amount of components to make up the set in the shipment.

[2] *See* HQ 965497, in which Customs states the provision for swimwear is not limited to a combination of a top and bottom garment but covers all women's swimwear. It adds: Although there must be two pieces to be a "two-piece bathing costume", a bikini top is also classified as swimwear because the provision for women's swimwear is sufficiently broad. Thus swimwear tops and bottoms, when imported separately, remain classified as swimwear of heading 6112, HTSUSA.

check, close to the time of shipment, the Textile Status Report for Absolute Quotas, previously available on the Customs Electronic Bulletin Board (CEBB), which is available now on the CPB website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification), your client should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT J]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965928
August 14, 2003
CLA–2 RR:CR:TE 965928 TF
CATEGORY: Classification
TARIFF NO.: 6112.41.0010

WILLIAM F. SULLIVAN, SPECIAL SERVICES MANAGER
MSAS CUSTOMS LOGISTICS, INC.
150–16 132nd Avenue
Jamaica, NY 11434

RE: Modification of HQ 952907; Classification of Mix and Match Women's Swimwear; Tops and Bottoms Imported Together but Separately Packaged in Unequal Quantities of Tops and Bottoms; Classification Based on Condition at the Time of Importation; Classification Based on the Intended Manner of Sale; HQ 962125, dated May 5, 2000; HQ 965497, dated April 6, 2002

DEAR MR. SULLIVAN:

Pursuant to your classification request, on behalf of your client, New Hampton Inc., concerning certain styles of women's mix and match swimwear, Customs issued Headquarters Ruling Letter (HQ) 952907, dated January 29, 1993, to your company. This ruling classified the merchandise in subheading 6112.41.0010, HTSUSA, which provides for women's knit swimwear of synthetic fibers, of fabric containing by weight 5 percent or more elastomeric yarn or rubber thread.

Upon review, the Bureau of Customs and Border Protection has determined that this classification is correct, however the analysis applied to reach the classification determination is incorrect. This ruling letter sets forth the correct classification determination based on the articles condition as imported rather than intended manner of sale as represented by the importer.

HQ 952907 is hereby modified for the reasons set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed modification of HQ 952907, dated January 29, 1993 was published on July 2, 2003, in Vol. 37, No. 27 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

The merchandise at issue consists of women's mix and match knit swimwear. Seven samples were submitted, all composed of 80% nylon and 20% spandex. Style S93–804–24 is a bra top with a hook closure and detachable shoulder straps. Style S93–804–22 is a crop-like garment. Styles S93–804–21 and S93–804–19 are solid (different) colored bikini bottoms with gussets. Style S93–804–23 is a bra top with shoulder straps and strap closures. Style S93–804–20 is a bikini bottom with a waistband and gusset. The seventh sample, lacking a style number, is a crop-like top design. Styles –21, –19 and –23 match as to fabric and color. The seventh sample matches the multi-colored bottoms –19 and –20.

You state that the garments are mix and match swimwear that will be packaged separately, but sold at retail as swimsuits. The tops and bottoms will be imported in unequal numbers.

ISSUE:

What is the proper classification of the merchandise within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

LAW AND ANALYSIS:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 6112, HTSUSA, provides *eo nomine* for swimwear. The EN to heading 6112 states that the heading includes, "Swimwear (knitted or crocheted one-piece or two-piece bathing costumes, swimming shorts and trunks, whether or not elastic)." The EN to heading 6112 specifically references "one-piece or two-piece bathing costumes."

The issue in this case is whether the classification of the separately packaged, unequal quantities of mix and match swimwear tops and bottoms is based on the intent of the importer. Part of this issue was previously considered by Customs in Headquarters Ruling Letter (HQ) 965497, dated April 6, 2002, in which separately imported mix and match swimwear was classified in subheading 6112.41.0010, HTSUSA, which provides for women's swimwear of synthetic fibers, of fabric containing by weight 5 percent or more elastomeric yarn or rubber thread.

With regard to whether the intent of the importer is controlling in classifying swimwear merchandise, we note that in HQ 952907, Customs stated that when sets of garments are not packed together in a manner that clearly

identifies them as suits at the time of importation, the classification is based on the bona fide intent of the importer. However, since the issuance of HQ 952907, Customs has revisited this matter in HQ 962125, dated May 5, 2000, and clarified its position by stating that the intent of the importer is irrelevant to the goods' classification. The condition of the goods as imported is determinative.

In this instance, the unequal quantities of mix and match swimwear tops and bottoms are to be sold as swimsuit sets. The classification of swimwear merchandise was addressed in HQ 965497 dated April 6, 2002, in which Customs considered whether the EN's specific reference to "one-piece or two-piece bathing costumes" requires that both pieces are imported together. In reaching its determination, Customs ruled that "two-piece bathing costumes", such as bikinis, are provided for under heading 6112, HTSUSA, as GRI 1 sets. It was also determined that subheading 6112.41, HTSUSA, which provides for "women's or girls' swimwear", is sufficiently broad to encompass one piece of a two-piece bathing costume.[1] Id. Thus, Customs logically concluded that where separately packaged swimwear tops and bottoms are imported in unequal quantities, any "extra" tops or bottoms are also classified as swimwear of heading 6112, HTSUSA. Id.

This ruling serves to apply HQ 962125 to the classification of the unequal quantities of mix and match swimwear tops and bottoms by determining that the merchandise is classifiable (based on its condition as imported) in heading 6112, HTSUSA, which provides for women's swimwear, so long as the subject merchandise is imported together in the same shipment, coordinated and matched by size, and constructed and designed to be used exclusively or mainly for swimming.

Therefore, to the extent that HQ 952907 relied on the intent of the importer to classify the goods, we find the ruling to be in error and we are striking the reference to the intent of the importer in HQ 952907 as this has no bearing on the classification determination.

In sum, where a shipment contains an equal number of mix and match swimwear tops and bottoms, the goods are classified as swimwear of heading 6112, HTSUSA based on their condition as imported. When imported separately, or when imported without a matching component, the merchandise is also classified as swimwear of heading 6112, HTSUSA. For further details, we refer you to HQ 962125, which is enclosed.

HOLDING:

HQ 952907, dated January 29, 1993, is hereby modified.

An equal number of mix and match swimwear tops and bottoms are classified in subheading 6112.41.0010, HTSUSA, as "women's . . . swimwear, of synthetic fibers, of fabric containing by weight 5 percent or more elastomeric yarn or rubber thread." The applicable general column one rate of duty is 25.1 percent *ad valorem* and the quota category is 659.

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[1] *See* HQ 965497, in which Customs states the provision for swimwear is not limited to a combination of a top and bottom garment but covers all women's swimwear. It adds:

> Although there must be two pieces to be a "two-piece bathing costume", a bikini top is also classified as swimwear because the provision for women's swimwear is sufficiently broad. Thus swimwear tops and bottoms, when imported separately, remain classified as swimwear of heading 6112, HTSUSA.

Any component that is imported separately without a matching component is classified in subheading 6112.41.0010, HTSUSA, as "women's . . . swimwear, of synthetic fibers, of fabric containing by weight 5 percent or more elastomeric yarn or rubber thread." The applicable general column one rate of duty is 25.1 percent *ad valorem* and the quota category is 659.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest your client check, close to the time of shipment, the Textile Status Report for Absolute Quotas, previously available on the Customs Electronic Bulletin Board (CEBB), which is available now on the CPB website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification), your client should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF FOOTWEAR PARTS

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of ruling and treatment relating to the tariff classification of footwear uppers and sock liners.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs and Border Protection (CBP) intends to revoke a ruling letter pertaining to the tariff classification of footwear uppers and sock liners, and to revoke any treatment previously accorded by CBP to substantially identical merchandise.

DATE: Comments must be received on or before October 3, 2003.

ADDRESS: Written comments are to be addressed to Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at CBP, 799 9th Street, N.W., Washington, D.C., during regular business hours. Ar-

rangements to inspect submitted comments should be made in advance by contacting Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textiles Branch, at (202) 572–8811.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that, in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(1)), this notice advises interested parties that CBP intends to revoke a ruling letter pertaining to the tariff classification of footwear uppers and sock liners. Although in this notice CBP is specifically referring to New York Ruling Letter (NY) J82823, this notice covers any rulings relating to the specific issues of tariff classification set forth in the ruling, which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No additional rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, an internal advice memorandum or decision, or a protest review decision) on the issues subject to this notice, should advise CBP during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(2)), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling that was issued to a third party to

importations involving the same or a similar issue, or the importer's or CBP's previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions, or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision on this notice.

In NY J82823, dated April 7, 2003, leather uppers for men's boots that were imported with an equal number of unattached sock liners, were found to comprise unassembled formed uppers pursuant to GRI 2(a). For American men's sizes 8-1/2 and larger, the articles were classified in subheading 6406.10.05, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Formed uppers: Of leather or composition leather: For men, youths and boys." NY J82823 is set forth as Attachment A to this document.

Upon review of NY J82823, we find that the sock liner is not the component that will be assembled to the upper to close the bottom, and that a closed bottom results only after importation, when the upper is both front-part and back-part lasted and an insole component (not present at importation) is assembled to the upper. The upper and sock liner should therefore be separately classified; the upper in subheading 6406.10.65, HTSUSA, the provision for "Parts of footwear . . . : Uppers and parts thereof, other than stiffeners: Other: Of leather," and the inner sole/sock liner in subheading 6406.99.90, HTSUSA, the provision for "Parts of footwear . . . : Other: Of other materials: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP intends to revoke NY J82823 and any other rulings not specifically identified, to reflect the proper classification of the footwear parts according to the analysis in proposed Headquarters Ruling Letter (HQ) 966429, which is set forth as Attachment B to this document. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP intends to revoke any treatment that CBP may have previously accorded to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

DATED: August 15, 2003

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY J82823
April 7, 2003
CLA–2–64:RR:NC:347:J82823
CATEGORY: Classification
TARIFF NO.: 6406.10.05, 6406.10.10, 6406.10.65

MR. JOHN PELLEGRINI
ROSS & HARDIES
65 East 55th Street
New York, NY 10022–3219

RE: The tariff classification of footwear parts from Dominican Republic.

DEAR MR. PELLEGRINI:

In your letter dated March 25, 2003, you requested a tariff classification ruling on behalf of The Timberland Company. The merchandise which is the subject of this ruling is an upper for a man's boot imported with an unattached inner sole. You refer to the inner soles as "sock liners." You state that the upper will be imported with an equal number of sock liners. You describe the items as:

The upper is a leather boot upper with seven eyelets. The upper is completely open at the bottom and is neither front-part nor back-part lasted.

The sock liner consists of multiple materials in three layers. The top layer is a combination of leather and a non-woven textile with leather representing the majority of the surface area. The middle layer is rubber/plastic. The bottom layer is "BONTEX", a paperboard. Additional U.S. Note 4 to Chapter 64, Harmonized Tariff Schedule of the United States (HTS), sets forth the criteria for determining whether an upper is considered a formed upper for tariff purposes. That note reads, in pertinent part, as follows: . . . [p]rovisions for "formed uppers" covers uppers, with closed bottoms which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom. The sample boot upper submitted with your ruling request has been shaped by the insertion of molded plastic heel and front vamp stiffeners and is completely open at the bottom. In this regard it is not a "formed upper" due to the bottom not being closed. However, the upper and innersole combination, if imported together, will comprise an unassembled "formed upper" pursuant to General Rule Of Interpretation (GRI) 2 (a) which provides:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled. See Headquarters Ruling Letter (HRL) 954790 dated September 28, 1993, where it was ruled that the term "formed uppers" does not include moccasin uppers with a significant sized hole (the size of a nickel or larger) in the bottom layer whether or not the upper is fully formed (lasted) unless the piece which will cover that opening is in the same shipment. If this is the case, the uppers would be considered "formed" for tariff purposes If imported separately, the applicable

subheading for the upper will be 6406.10.65 (HTS) which provides for parts of footwear, uppers and parts thereof, other (than formed uppers), of leather. The rate of duty will be free. If imported together, the applicable subheading for the upper and inner-sole combination in sizes up to and including American men's size 8 will be 6406.10.10 (HTS), which provides for parts of footwear, uppers and parts thereof, formed uppers, for other persons. The rate of duty will be 10 percent ad valorem. For sizes larger than American men's size 8, the applicable subheading will be 6406.10.05 (HTS) which provides for parts of footwear, uppers and parts thereof, formed uppers, for men, youths and boys. The rate of duty will be 8.5 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist, Richard Foley at 646–733–3042.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[Attachment B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966429
CLA–2 RR:CR:TE 966429 GGD
CATEGORY: Classification
TARIFF NO.: 6406.10.65; 6406.99.90

JOHN B. PELLEGRINI, ESQUIRE
ROSS & HARDIES
Park Avenue Tower
65 East 55th Street
New York, New York 10022–3219

RE: Revocation of NY J82823; Men's Boot Upper Imported with Sock Liner; Not Formed Upper

DEAR MR. PELLEGRINI:

This is in response to your request dated April 16, 2003, to reconsider New York Ruling Letter (NY) J82823, issued to you by the Bureau of Customs and Border Protection (CBP) April 7, 2003, on behalf of your client, The Timberland Company. In NY J82823, leather uppers imported with an equal number of unattached sock liners were found to comprise unassembled formed uppers pursuant to General Rule of Interpretation (GRI) 2(a). Samples of each component were submitted with your request. We have reviewed the ruling and have found it to be in error. Therefore, this ruling revokes NY J82823.

FACTS:

The footwear components at issue herein and in NY J82823, are leather uppers for a man's boot, imported with equal numbers of unattached sock liners. The upper is completely open at the bottom and, although neither front-part nor back-part lasted, is shaped by molded plastic stiffeners that have been stitched in at the heel and front vamp. The sock liner is composed of four separate materials in three layers. The top layer (the surface upon which the foot would rest) is made of a combination of leather (at the back) and nonwoven textile material (at the front), with leather making up the majority of the surface area. The middle layer is composed of a foam rubber/plastic and the bottom layer consists of a paperboard material identified as BONTEX®.

Although at the time of importation, the bottom of the upper is not closed, the upper and sock liner, imported together, were found to constitute an unassembled "formed upper" pursuant to GRI 2(a). Therefore, for American men's sizes 8-1/2 and larger, the article was classified in subheading 6406.10.05, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Formed uppers: Of leather or composition leather: For men, youths and boys." For sizes up to, and including, American men's size 8, the article was classified in subheading 6406.10.10, HTSUSA, the provision for "Parts of footwear . . . : Uppers and parts thereof . . . : Formed uppers: Of leather or composition leather: For other persons."

ISSUE:

Whether the two footwear components, as entered, constitute an unassembled "formed upper" pursuant to GRI 2(a), HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Subheading 6406.10, HTSUS, provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles) . . . : Uppers and parts thereof, other than stiffeners: Formed uppers: Of leather or composition leather."

Additional U.S. Note 4 to chapter 64, HTSUS, states:

> Provisions of subheading 6406.10 for "formed uppers" cover uppers, with **closed bottoms**, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom. [Emphasis added.]

The sample goods consist of an upper with an open bottom and a sock liner. Although the upper has not been shaped by lasting, examination of the

sample indicates that it has attained a certain degree of shape by the insertion of molded plastic stiffeners at the heel and front vamp. (See Headquarters Ruling Letter (HQ) 958265, dated August 7, 1995, concerning shape imparted by stitched-in counter pieces.) With respect to the legal note's requirement for closed bottoms, NY J82823 cited to HQ 954790, dated September 28, 1993, for the latter ruling's statement that:

> the term "formed uppers" does not include moccasin uppers with a significant sized hole (the size of a nickel or larger) in the bottom layer whether or not the upper is fully formed (lasted) unless the piece which will cover that opening is in the same shipment.

Considering the sock liner as a piece capable of covering the upper's opening, NY J82823 also examined the requirements of GRI 2(a), which states:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

Drawing from both HQ 954790 and the requirements of GRI 2(a), it was determined in NY J82823 that the sock liner, once assembled to the bottom of the leather boot upper, would cover the upper's opening (creating a closed bottom), and that the two components therefore had the essential character of a complete or finished "formed upper" entered unassembled.

In your submission, you essentially state that this combination of uppers and sock liners must be classified separately and cannot be constructively assembled because: 1) the upper is neither front-part nor back-part lasted, thus lacking its final shape and ability to have a closed bottom through assembly with only the sock liner; 2) the upper acquires a closed bottom only through post-importation processing (which includes back-part lasting, attachment of an insole component that is not present at importation, and steaming/shaping of toe and heel); and 3) the sock liner is never attached to the upper but, after application of an adhesive, is inserted by hand into the essentially complete boot as part of the packing process.

You cite to several CBP rulings (the most persuasive of which appear to be HQ 088483, dated March 19, 1991, and HQ 089580, dated September 6, 1991) to support your contention that uppers must be both front-part and back-part lasted in order for an insole/sock liner to be deemed constructively assembled pursuant to GRI2(a). You also refer to the "constructive assembly" of the upper and sock liner at issue as "fictional" and not within the purview of GRI 2(a), because the formed upper, in reality, is constructed of both imported and domestic articles, or of articles which are imported in different shipments.

In light of the components used, and the further working operations required after importation to assemble a formed upper with a closed bottom, we will not address the absence of lasting or sufficiency of the shaping imparted by the molded plastic stiffeners at the heel and front vamp. In pertinent part, Explanatory Note VII to GRI 2(a) states:

> For the purposes of this Rule, "articles presented unassembled or disassembled" means articles the components of which are to be assembled

> either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, provided only assembly operations are involved.
>
> No account is to be taken in that regard of the complexity of the assembly method. However, **the components shall not be subjected to any further working operation for completion into the finished state.** [Emphasis added.]

In this case, the sock lining is not the component that will be assembled to the upper, nor will it cover the opening to form a closed bottom. The sock liner is eventually inserted into the boot and its bottom layer is glued to the top of the insole. The insole is not present at importation, and the insole and upper are subjected to further working operations in order to complete the article into its finished state. Such working operations are not permitted if GRI 2(a) is to apply. We thus find that the two unassembled components, as entered, do not possess the essential character of a complete or finished "formed upper." GRI 2(a) is inapplicable to the imported components and they must be separately classified.

The sock liner is composed of four distinct materials in three layers, i.e., paperboard (which provides a stable base for attachment to the insole), rubber/plastic (for cushioned comfort), leather and nonwoven textile (also for comfort), none of which predominates in importance for determining essential character. (See NY 885769, dated May 6, 1993.) The sock liner is therefore classified pursuant to GRI 3(c), according to the material provided for in the provision which occurs last in numerical order, i.e., subheading 6406.99.90, HTSUSA, the provision for "Parts of footwear . . . removable insoles, heel cushions and similar articles . . . and parts thereof: Other: Of other materials: Other." The leather boot upper is classified in subheading 6406.10.65, HTSUSA, the provision for "Parts of footwear (including uppers whether or not attached to soles other than outer soles) . . . : Uppers and parts thereof, other than stiffeners: Other: Of leather."

HOLDING:

NY J82823, dated April 7, 2003, is hereby revoked.

The leather boot upper is classified in subheading 6406.10.65, HTSUSA, the provision for "Parts of footwear (including uppers whether or not attached to soles other than outer soles) . . . : Uppers and parts thereof, other than stiffeners: Other: Of leather." The general column one duty rate is free.

The sock liner is classified in subheading 6406.99.90, HTSUSA, the provision for "Parts of footwear . . . removable insoles, heel cushions and similar articles . . . : Other: Of other materials: Other." The general column one duty rate is free.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF CUSTARD FLAN

AGENCY: U.S. Customs and Border Protection, Department Homeland Security.

ACTION: Notice of proposed modification of ruling letter and revocation of treatment relating to the classification of custard flan.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a custard flan and revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before October 3, 2003.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at 202–572–8768.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202–572–8778.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on

Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a custard flan. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NY) I87776, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In NY I87776, dated December 10, 2002, the classification of a product commonly referred to as "Danette Flan" was determined to be in subheading 1901.90.4600, HTSUS, which provides for food preparations of goods of headings 0401 to 0404, not containing cocoa . . . not elsewhere specified of included . . . other . . . other dairy products described in additional U.S. note 1 to Chapter 4 . . . other . . . described in additional U.S. note 10 to Chapter 4 and

entered pursuant to its provision. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error. Because of the ingredient composition of the product "Danette Flan," the proper classification is in subheading 1901.90.4200, HTSUS, which provides for food preparations of goods of headings 0401 to 0404, not containing cocoa . . . not elsewhere specified of included . . . other . . . other dairy products described in additional U.S. note 1 to Chapter 4: dairy preparations containing over 10 percent by weight of milk solids: described in additional U.S. note 10 to Chapter 4 and entered pursuant to its provision. If the quantitative limits of additional U.S. note 10 to chapter 4 have been reached, the product will be classified in subheading 1901.90.4300, HTSUS, the over-quota subheading. The classifications of other products in NY I87776 are correct and are not being modified by this action.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NY I87776, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 966116 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 19, 2003

Gerard J. O'Brien for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY I87776
November 14, 2002
CLA–2–19:RR:NC:228 I87776
CATEGORY: Classification
TARIFF NO.: 1901.90.2500; 1901.90.4600;
1901.90.4700; 2106.90.5830

MR. JOHN M. PETERSON
NEVILLE PETERSON LLP
80 Broad Street
New York, NY 10004

RE: The tariff classification of dessert products from Mexico

DEAR MR. PETERSON:

In your letter dated October 22, 2002, on behalf of Groupe Danone/The Dannon Company, Inc., Tarrytown, NY, you requested a tariff classification ruling.

Samples, ingredients breakdown, and a description of the manufacturing process were submitted with your letter. The samples were examined and disposed of. Dannette Custard, vanilla and chocolate flavored, are cooked, ready to eat foods in the form of moderately thick, creamy products packed in foil-sealed plastic cups containing 100 grams, net weight. The products are firm enough to hold a plastic spoon upright, and when scooped out, remain on the spoon. Ingredients common to both products are skim milk, sugar, cream, starch, skim milk powder, gelatin, and tetrasodium pyrophosphate. The chocolate-flavored product also contains cocoa powder and powdered chocolate; the vanilla-flavored item contains vanillin flavor, annato color and curcumin color. Danette Flan is a ready to eat, yellow-colored, soft yet moderately firm product, put up in foil-sealed plastic cups containing 100 grams, net weight. Easily removed from the cup, it retains the pyramid-like shape imparted by the container. Eaten from the cup or plate, the flan is easily "cut" with a spoon. Flan is composed of skim milk, sugar, cream, caramel, skim milk powder, eggs, carrageenan, vanillin, tetrasodium pyrophosphate, and color. Dany Gelatin Dessert, in seven different flavors, is a food product with a firm gel structure, packed in foil-sealed plastic cups containing 100 grams, net weight. Regardless of flavor, the gelatin desserts all contain water, sugar, gelatin, citric acid, flavor, and sodium citrate. Depending on variety, the gelatin desserts may also contain added color.

The applicable subheading for the Danette Custard will be 1901.90.2500, Harmonized Tariff Schedule of the United States (HTS), which provides for food preparations of flour, groats, meal, starch or malt extract, not containing cocoa or containing less than 40 percent by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included . . . other . . . puddings ready for immediate consumption without further preparation. The rate of duty will be free.

The applicable subheading for the Danette Flan, if imported in quantities that fall within the limits described in additional U.S. note 10 to chapter 4, will be 1901.90.4600, HTS, which provides for food preparations of goods of

headings 0401 to 0404, not containing cocoa . . . not elsewhere specified or included . . . other . . . other . . . dairy products described in additional U.S. note 1 to chapter 4 . . . other . . . described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions. The rate of duty will be 16 percent ad valorem. If the quantitative limits of additional U.S. note 10 to chapter 4 have been reached, the product will be classified in subheading 1901.90.4700, HTS, and dutiable at the rate of $1.035 per kilogram plus 13.6 percent ad valorem.

The applicable subheading for the Dany Gelatin Desserts will be 2106.90.5830, HTS, which provides for food preparations not elsewhere specified or included . . . other . . . of gelatin . . . put up for retail sale . . . containing sugar derived from sugar cane or sugar beets. The rate of duty will be 4.8 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Stanley Hopard at 646–733–3029.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966116
CLA–2 RR:CR:GC 966116ptl
CATEGORY: Classification
TARIFF NO.: 1901.90.4200; 1901.90.430

MS. MARIA E. CELIS
NEVILLE PETERSON, LLP
80 Broad Street
New York, NY 10004

Re: Modification of NY I87776; "Danette Flan"

DEAR MS. CELIS:

This is in response to your request, dated December 10, 2002, that Customs reconsider New York Ruling Letter (NY) I87776, issued by the National Commodity Specialist Division in New York, on November 14, 2002, to your firm, on behalf of the Dannon Company regarding the classification of Danette Flan under the Harmonized Tariff Schedule of the United States (HTSUS). That ruling classified the Danette Flan in subheading 1901.90.4600, HTSUS, which provides for food preparations of goods of headings 0401 to 0404, not containing cocoa . . . not elsewhere specified of included . . . other . . . other dairy products described in additional U.S. note 1 to Chapter 4 . . . other . . . described in additional U.S. note 10 to Chapter 4 and entered pursuant to its provision.

You contend that the product should be classified in subheading 1901.90.2500, HTSUS, which provides for puddings ready for immediate consumption without further preparation.

We have reviewed the ruling and determined that, based on the composition of the product, the classification was incorrect. The correct classification, as discussed below, is in subheading 1901.90.4200, HTSUS, which provides for food preparations of goods of headings 0401 to 0404, not containing cocoa . . . not elsewhere specified of included . . . other . . . other dairy products described in additional U.S. note 1 to Chapter 4: dairy preparations containing over 10 percent by weight of milk solids: described in additional U.S. note 10 to Chapter 4 and entered pursuant to its provision. If the quantitative limits of additional U.S. note 10 to chapter 4 have been reached, the product will be classified in subheading 1901.90.4300, HTSUS, the over-quota subheading.

FACTS:

The product under consideration, "Danette Flan," is a ready-to-eat, soft, yet moderately firm, light yellow colored product, put up in foil sealed plastic cups, each containing 100 grams, net weight. The product is said to contain the following ingredients: skim milk, cream, refined sugar, powdered eggs, carrageenan, skim milk powder, anhydrous tetrasodium pyrophosphate, vanillin flavor, color and caramel. Samples you provided were examined and disposed of because they were perishable.

ISSUE:

Whether a "flan" is a pudding of subheading 1901.90.25, HTSUS, or an "other preparation of goods of headings 0401 to 0404"?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS subheadings under consideration are as follows:

1901	Malt extract; food preparations of flour, groats, meal, starch or malt extract, not containing cocoa or containing less than 40 percent by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5 percent by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included:

* * *

1901.90	Other
	* * *
1901.90.2500	Puddings ready for immediate consumption without further preparation
	* * *
	Other:
	Dairy products described in additional U.S. note 1 to chapter 4:
	Dairy preparations containing over 10 percent by weight of milk solids:
	* * *
1901.90.4200	Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions
1901.90.4300	Other[1]
	Other:
	* * *
1901.90.4600	Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions
1901.90.4700	Other[2]

[1] See subheadings 9904.04.50–9904.05.01.
[2] See subheadings 9904.04.50–9904.05.01.

You contend that the proper classification of the product, "Danette Flan," is in subheading 1901.90.2500, HTSUS, which provides for puddings, ready for immediate consumption. You allege this is so because the product satisfies the common meaning of the term "pudding," and because it is made in "the same exact fashion and made to the same consistency" as another Dannon product which has been determined to be classified in the pudding subheading.

As an introduction to your argument that a "Flan" should be considered to be a "Pudding," you note that the term "pudding" is not defined in the HTSUS or the ENs. You state, and we agree, that in the absence of a definition of a term in the tariff or the ENs, the term's correct meaning is its common and commercial meaning. The meaning of a term may be ascertained from lexicographic authorities. (See *Carl Zeiss v. United States*, 195 F3d 1375 (Fed. Cir. 1999)) Your submission contains definitions of "pudding" from several sources. You state: "Pudding is also a species of food of a soft or moderately hard consistence, variously made, but often a compound of flour or meal, with milk and eggs, etc. According to the American Heritage Dictionary, pudding is either (1) a sweet dessert, usually containing flour or a cereal product, that has been boiled, steamed, or baked; or (2) a mixture with a soft, puddinglike consistence. Finally, pudding is a thick, soft dessert, typi-

cally containing flour or some other thickener, milk, eggs, a flavoring, as tapioca pudding." (Citations omitted)

You further argue that Customs has classified "similar" products as puddings. You cite NY 854493, dated August 2, 1990, where haupia, a cooked, sweet dessert made from coconut milk, sugar, water and corn starch, put up in cans for retail sale, was classified in subheading 1901.90.2500, HTSUS. You also cite NY 814294, dated November 14, 1995, where pudding products made from water, sucrose syrup, condensed milk, starch, salt, flavor and color were classified in subheading 1901.90.2500, HTSUS, as puddings ready for immediate consumption. Finally, you refer to the ruling you are asking us to reconsider, NY I87776, in which Danette custards, composed of skim milk, sugar, cream, starch, skim milk powder, gelatin, and tetrasodium pyrophosphate, were classified in subheading 1901.90.2500, HTSUS. You claim that because Customs classified these products under the subheading for puddings, your flan should be classified there also.

The definitions and case citations you have provided are consistent with Customs classification and treatment of puddings and flans. In fact, they support the classification of the Danette flans contained in NY I87776, as products that are not puddings. Customs has consistently followed a three-part evaluation process in determining whether products should be classified as puddings. The criteria used were the ingredient composition of the product, its method of preparation, and its form.

In NY 854493, which you cited, it is significant that a product, kulolo (taro pudding) which is prepared similarly to the haupia but with different ingredients, and containing no farinaceous substance, was not classified as a pudding, but in heading 2008.99.9090, HTSUS, the provision for other edible parts of plants, otherwise prepared or preserved . . . other . . . other.

A flan may be pudding-like, but it is not a pudding. A reading of the definitions of "pudding" that you provided, and the product ingredients in the cases you cited, will show that all "puddings" contain some starch or flour, meal, or cereal product with a farinaceous base. A flan does not. A flan is a milk-based, sweet dessert, prepared by cooking, but it has no farinaceous base. Traditionally, flans achieve their semi-solid form through the gelling action of the egg ingredients. The Danette flan contains both eggs (powdered) and carrageenan which will also cause gelling.

Puddings are described by that portion of heading 1901, HTSUS, which provides for food preparations of flour, groats, meal, starch, . . . not elsewhere specified or included. Flans, which do not contain flour, meal or starch, are described by that portion of the same heading which provides for food preparations of headings 0401 to 0404 . . . not elsewhere specified of included. Customs has consistently classified flans and other milk-based products that do not qualify for classification as puddings in the dairy subheadings of heading 1901, HTSUS. (See HQ 950624, dated February 20, 1992; HQ 958036, dated August 4, 1995) The actual subheading depends on the amount of milk solids in the product.

When considering the product, Danette flan, one determines the total milk solids composition of the product by adding the milk solid percentage of the various milk component ingredients together. For this product, they are: skim milk — 73.95% (with a standard 9.5% milk solids) produces 7.02% milk solids; cream (40% fat content) — 8.7% produces 3.23% milk solids; and skim milk powder — 1.33 % produces 1.33% milk solids. Thus, the total percentage of milk solids in the product is: 7.02 + 3.23 +1.33 or 11.58%. Because

this is greater than 10%, classification is in subheadings 1901.90.4200 or 1901.90.4300, HTSUS, depending on whether the quantitative limits of additional U.S. note 10 to chapter 4 have been reached.

In NY I87776, the Danette Flan was classified in the subheading for dairy preparations which do not contain over 10 percent by weight milk solids. As discussed above, the product does contain over 10 percent by weight milk solids. Therefore, this ruling modifies NY I87776 by correcting the classification of Danette flan to properly reflect its ingredient composition.

HOLDING:

Danette Flan, a ready-to-eat yellow-colored product in 100 gram foil-sealed plastic cups is classified in subheading 1901.90.4200, HTSUS, which provides for food preparations of goods of headings 0401 to 0404, not containing cocoa . . . not elsewhere specified of included . . . other . . . other dairy products described in additional U.S. note 1 to Chapter 4: dairy preparations containing over 10 percent by weight of milk solids: described in additional U.S. note 10 to Chapter 4 and entered pursuant to its provision. If the quantitative limits of additional U.S. note 10 to chapter 4 have been reached, the product will be classified in subheading 1901.90.4300, HTSUS, the over-quota subheading.

EFFECT ON OTHER RULINGS:

NY I87776, dated November 14, 2002, is modified in accordance with this ruling.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 03–104

VOLKSWAGEN OF AMERICA, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 96–00132

[Plaintiff's motion for summary judgment is denied, and Defendant's motion for summary judgment is denied.]

Date: August 13, 2003

Law Offices of Thomas J. Kovarcik (Thomas J. Kovarcik) for plaintiff Volkswagen of America, Inc.

Peter D. Keisler, Assistant Attorney General; John J. Mahon, Acting Attorney in Charge; Barbara S. Williams, Civil Division, Commercial Litigation Branch, United States Department of Justice; Yelena Slepak, Office of Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, Of Counsel, for defendant United States.

OPINION

GOLDBERG, Senior Judge: In 1994 and 1995, Plaintiff Volkswagen of America, Inc. ("VW") imported automobiles from foreign manufacturers Volkswagen Aktiengesellschaft ("VWAG") and Audi Aktiengesellschaft ("Audi"). VW then sold the imported automobiles to customers in the United States under consumer warranties. After importation, VW discovered some automobiles were defective. Pursuant to the consumer warranties, VW repaired the defects, and tracked the repairs by the individual Vehicle Identification Numbers ("VINs"). VW also maintained computer records of the cost for each warranty repair, and was reimbursed by VWAG and Audi for all warranty repairs.

VW appeals the United States Customs Service's[1] ("Customs") denial of the following protests in its complaint: 5301–95–100342,

[1] The United States Customs Service has since become the Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

5301–4–100550, 5301–5–100072, 5301–5–100178, 5301–5–100279, 5301–95–100342, 1803–94–100041, 1803–94–100042, 1803–94–100072, 5401–94–100010, 5401–94–100019, 5401–94–100016, 5401–93–100022, 5401–93–100026, 5401–93–100078, 1101–95–100590, 1101–95–100499, 1101–95–100679, and 1101–95–100708. These protests cover sixty-nine entries; however, VW maintains that it is only moving for summary judgment on eighteen of the entries. VW also states in its Reply Brief that it "moves to sever and dismiss from this action other entries and protests included in the Summons that are not set forth in Appendix 1." The Court will grant VW's motion to dismiss the other entries from the case, without prejudice. Therefore, the Court retains jurisdiction over the following: entry numbers 110–1030393–9, 110–9691248–7, 110–9691645–4, 110–1030968–8, 110–9691813–8, 110–1030670–0, 110–7609214–4, 110–9691328–7, 110–7609254–0, 110–7609111–2, 110–7157040–9, 110–7157943–4, 110–7157110–0, 110–7157246–2, 110–7158048–1, 110–7157706–5, 110–7157464–1, 110–7157491–4. These entries are contained in protest numbers 1101–95–100708, 1101–95–100679, 1101–95–100590, 1101–95–100499, 5301–4–100550, 5301–95–100342, 5301–5–100178, 5301–5–10072.

I. STANDARD OF REVIEW

This case is before the Court on VW's motion for summary judgment and Customs' cross-motion for summary judgment. The court will grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d). A party opposing summary judgment must "go beyond the pleadings" and by his or her own affidavits, depositions, answers to interrogatories, and admissions to file, designate "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). "While it is true that Customs' appraisal decisions are entitled to a statutory presumption of correctness, see 28 U.S.C. § 2639(a)(1), when a question of law is before the Court, the statutory presumption of correctness does not apply." Samsung Electronics America, Inc. v. United States, 23 CIT 2, 5, 35 F. Supp. 2d 942, 945–46 (1999) (citing Universal Elecs., Inc. v. United States, 112 F.3d 488, 492 (Fed. Cir. 1997)) (hereinafter "Samsung III").

II. DISCUSSION

A. Jurisdictional Issues

The Court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a) (2000).

Therefore, a prerequisite to jurisdiction by the Court is the denial of a valid protest. Washington Int'l Ins. Co. v. United States, 16 CIT 599, 601 (1992). Based on the following analysis, the Court concludes that VW filed a valid protest, and thus the Court has jurisdiction.

A protest is required to "set forth distinctly and specifically" the following information: (1) "each decision . . . as to which protest is made"; (2) "each category of merchandise affected by each decision . . ."; and (3) "the nature of each objection and the reasons therefor." 19 U.S.C. § 1514(c)(1) (2000). The implementing regulations expand the requirements, specifying that the protest must include "[a] specific description of the merchandise affected by the decision as to which protest is made"; and "[t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a) (2002).

In the seminal case Davies v. Arthur, 96 U.S. 148 (1877), the Supreme Court articulated the rationale for the specificity required of protests:

> Protests . . . must contain a distinct and clear specification of each substantive ground of objection to the payment of the duties. Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

Davies, 96 U.S. at 151.

Customs contends that the protests filed by VW were not distinct and specific since VW did not (a) tie specific repairs to specific entries and give the dollar amounts for the repairs; (b) state the amount of the allowance claimed; or (c) identify the claimed defects. Under Customs' reasoning, the protests' deficiencies undermined the rationale for requiring specificity in the protest, namely to notify Customs of the true nature of VW's protest so that Customs could correct any defect. Customs argues that this case is similar to Washington, because the claimed deficiencies in the protests would " 'eviscerate the protest requirements mandated by Congress and effectively require Customs to scrutinize the entire administrative record of every entry in order to divine potential objections and supporting arguments which an importer meant to advance.' " Custom's Brief at 10–11 (quoting Washington at 604).

The Court concludes that Customs' argument is not persuasive. In the principal case upon which Customs relies, Washington, the court held that an importer's protest of a Customs' classification ruling

was not valid because it did not counter with its own asserted classification. In that context, the Court found that the protests' deficiencies required Customs to analyze the entire administrative record to determine every possible classification the importer could assert, and argue against each possibility.

The critical distinction between this case and Washington is that VW is not challenging a classification. There is no alternative classification for VW to propose. Ideally, in challenging a classification an importer would provide Customs with the alternative(s) so that Customs could analyze sample evidence to determine the classification for the entire shipment. In this case VW has provided Customs with the regulation to apply: VW protested the liquidation because of "latent defects." Unlike the protest in Washington, Customs does not have to contemplate all of the statutory and regulatory provisions pertaining to liquidation to determine why VW is protesting the liquidation. Customs' real concern with VW's protests is that the protests will require Customs to evaluate the evidence of each repair to determine if the repaired defect existed at the time of importation, admittedly a time-consuming task. But the task remains the same even if VW listed all of the various defects in its protest. Customs would still have to analyze the evidence of repairs for every automobile, since the defects claimed are not uniform throughout the entries. Customs simply cannot avoid sifting through the entire evidentiary record in this type of claim.

Although VW's protests are distinct and specific in the spirit of Davies, VW's protests must contain the statutory and regulatory required elements for a valid protest. Because VW has set forth in its protest all of the required elements, VW has filed valid protests and the appeal from them is properly before the Court.

(1) VW's protest identified the decision protested

The regulations require the protestant to identify the decision "with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a). VW identified in its protests each decision as to which the protest was made, namely "the appraised value of the subject merchandise" in the attached entries. The attachments listed the entry numbers for entries of both defective and non-defective vehicles. Customs contends that VW was required to identify each defective vehicle, not simply identify entries that contained some defective vehicles. By including non-defective vehicles in the protests, Customs complains it is required to go through every entry and ascertain which vehicles were defective. The statute does not require that level of specificity in the protest, and as previously discussed, supra at 5–7, Customs cannot avoid sifting through each entry to evaluate the evidence of defects.

(2) VW identified the category of merchandise

VW identified the only category of the merchandise at issue, namely referring to "all merchandise covered by the above cited entry," and attaching the contested entries of automobiles to the protest.

(3) VW identified the nature of each objection

VW set forth the nature of its objection and the reason therefor in the identical language in protest numbers 1101–95–100708, 1101–95–100679, 1101–95–100590, 1101–95–100499, 5301–4–100550, 5301–95–100342, 5301–5–100178, 5301–5–10072:

> Protest is hereby made against your decision, liquidation, and assessment of duties on all merchandise covered by the above cited entry. The claim is that the appraised value of the subject merchandise, and consequently the duties assessed, should be reduced by a reasonable allowance for latent defects and/or maintenance costs.

VW Protests. The language of the protests and the attachments do not reference the specific vehicles that were defective or the types of latent defects, or tie the defects to specific vehicles. However, these are not fatal flaws in the protests. In Mattel v. United States, the court stated that the "one cardinal rule in construing a protest is that it must show fairly that the objection afterwards made at the trial was in the mind of the party at the time the protest was made and was brought to the knowledge of the collector to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect if it was one that could be obviated." 72 Cust. Ct. 257, 260, 377 F. Supp. 955, 959 (1974)(citing Bliven v. United States, 1 Ct. Cust. 205, 207 (Ct. Cust. App. 1911)). Customs contends the absence of precise facts makes the protests invalid. However, the protest is the tool whereby the collector seeks the precise facts. VW's protests clearly contest the appraised values of the entries because many of the vehicles allegedly contained latent defects, and clearly request an allowance commensurate with those defects.

On a more practical level, Customs cannot now claim that the language of the protests was insufficient to appraise Customs that the claims were sought under 19 C.F.R. § 158.12. The protests in this case contained the same language as the protests in the Samsung case. Customs did not challenge the language of the protests in Samsung at any point during the administrative proceedings or before the Court. The protests in Samsung read as follows:

> Protest is hereby made against your decision, liquidation, and assessment of duties on all merchandise covered by the above cited entry. The claim is that the appraised value of the subject

merchandise, and consequently the duties assessed, should be reduced by a reasonable allowance for latent defects and/or maintenance costs.

Samsung, Protest No. 1001–9–000182. It is disingenuous for Customs to claim now that the language of the protests by VW is insufficient when Customs has previously recognized the same language as a valid protest under 19 C.F.R. § 158.12. And while the Court is not constrained by Customs' admission of jurisdiction before the Court, it is persuasive here that when Customs first answered VW's complaint, Customs admitted that the Court had jurisdiction over this matter. See Answer, ¶1.

There is one problem with VW's protests that limits the Court's jurisdiction. It is clear that VW had in mind at the time of protest defective automobiles that had already been repaired; however, VW could not have had in mind defects to automobiles that had not been repaired before the protests were filed. Therefore, the Court does not have jurisdiction over the automobiles that were repaired after the date VW filed its protests with Customs.[2] See Mattel, 72 Cust. Ct. at 260, 377 F. Supp. at 959 ("a protest . . . must show fairly that the objection afterwards made at the trial was in the mind of the party at the time the protest was made"). As a result, the Court does not have jurisdiction over vehicles repaired after the individual protest dates of each of the eighteen entries.

B. The Evidence Submitted by VW

19 C.F.R. § 158.12 allows an importer to claim an allowance in value for merchandise partially damaged at the time of importation.[3] "A protestant qualifies for an allowance in dutiable value where (1) imported goods are determined to be partially damaged at the time of importation, and (2) the allowance sought is commensurate to the diminuation in the value of the merchandise caused by

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[2] VW styled its request for re-liquidation as § 1514 protests, most of which were filed within 90 days of liquidation, and therefore were timely protested. Section 158.12, which provides for a refund of duties if the goods were defective at the time of importation, has no time limit to request the refund. Because VW filed its request as a protest, the Court does not opine at this time on whether VW could have filed a request for reconsideration under § 1520 or directly under § 158.12, and then protest a denial of that request. See, e.g., HRL 547062, May 7, 1999 (In a section § 158.12 claim, protestant first filed a claim under § 520(c) of the Tariff Act to seek a reduction in the appraised value because the goods were defective when imported. Protestant later filed a protest when the § 520(c) claim was rejected.).

[3] The relevant part of § 158.12 reads:

(a) *Allowance in value.* Merchandise which is subject to ad valorem or compound duties and found by the port director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage. However, no allowance shall be made when forbidden by law or regulation . . . .

19 C.F.R. § 158.12 (2002).

the defect." Samsung III, 23 CIT at 6, 35 F. Supp. 2d at 946. Customs opposes VW's claims under §158.12 because (A) § 158.12 does not cover damaged goods when the damage was not discovered at importation; and (B) VW has not provided adequate evidence to overcome the presumption of correctness afforded Customs' denial of VW's protests.[4]

(1) Section 158.12 Covers Damage Undiscovered at Time of Importation

Customs' first challenge to the substance of VW's claim under § 158.12 is that this section does not apply to latent damage which was undiscovered at the time of importation. VW, however, argues that the section applies to defects existing at the time of importation, even if those defects remain undiscovered until some time after entry.

For the reasons articulated in Saab Cars USA v. United States, Slip Op. 03–82 (July 14, 2003), this Court rejects Customs argument that the port director has to discover the defects at the time of importation. Therefore, § 158.12 applies to defects existing at the time of importation, whether or not the defects were discovered by the port director at the time of importation.

(2) VW has shown that material issues of fact exist in its claim for an allowance under 19 C.F.R. § 158.12

Customs requires the protestant to establish the elements of 19 C.F.R. § 158.12 by clear and convincing evidence. See Samsung III, 23 CIT at 6, 35 F. Supp. 2d at 946 (approving this evidentiary standard). In Samsung III, the Court set forth three requirements for an importer to successfully claim an allowance under 19 C.F.R. § 158.12. First, the importer must show that it contracted for "defect-free" merchandise. Samsung III, 23 CIT at 4–5, 35 F. Supp. 2d at 945. Second, the importer must be able to link the defective merchandise to specific entries. Samsung III, 23 CIT at 6, 35 F. Supp. 2d at 945–46 (citing Samsung II, 106 F.3d at 379, n.4). Third, the importer must prove the amount of the allowance value for each entry. Id.

Regarding the first requirement, VW has easily shown that it contracted for "defect-free" merchandise. VWAG and Audi, the manufacturers, agreed to pay for the costs of repairing defects in the merchandise. See Samsung II, 106 F.3d at 379 (agreements between manufacturer and importer that some merchandise will be defective merely acknowledges the commercial reality that some goods will be defective, and does not mean that the importer contracted for defective merchandise). VW also warranted to its customers that the

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[4] Customs also challenges VW's claims because some repair claims allegedly include overhead expenses under 19 C.F.R. § 158.12. The Court will reserve that issue for trial.

goods were free of defects. See id. (evidence that importer warranted to its customers that the goods were defect-free demonstrated that importer ordered defect-free merchandise). And finally, VW, VWAG, and Audi, have a close corporate relationship, implying that VWAG and Audi would not sell VW defective merchandise. See id. at 379 (the close corporate relationship between manufacturer and importer implies Page 14 Court No. 96–00132 that the importer would not provide defective equipment to its consumers).

VW has shown there are material issues of fact regarding the second factor. Samsung III required the importer to establish by clear and convincing evidence which entries had defects at the time of importation. 23 CIT at 7–9, 35 F. Supp. 2d at 946–47. The importer in Samsung III did not provide sufficient evidence, offering only the consumer warranties and internal documents showing that claims for defects not existing at the time of importation were rejected. 23 CIT at 7–8, 35 F. Supp. 2d at 947–48. VW provides the evidence the Court in Samsung III sought: descriptions of repairs to each vehicle, and connects each vehicle repaired to a specific entry through the VINs. See Samsung III, 23 CIT at 8, 35 F. Supp. 2d at 947 ("a claimant should provide specific descriptions of the damage or defect alleged and, in some manner, relate that defective merchandise to a particular entry"). What remains for trial is development of the factual record to "independently confirm the validity" of the repair records, to establish that the defects did indeed exist at the time of importation. Id.

The third and final requirement for a successful claim under 19 C.F.R. § 158.12 is a showing by clear and convincing evidence of the amount of the allowances for each entry of the defective vehicles. Samsung III, 23 CIT 9–11, 35 F. Supp. 2d at 948–50. VW has detailed repair records that indicate the costs for each repair. Through the VINs, VW can tie the repair costs to each entry. Trial is necessary to independently verify the amount of the allowances. Therefore, VW has created a material issue of fact regarding the amount of the allowances, which will be resolved at trial.

III. CONCLUSION

Because material issues of fact remain, the Court denies VW's motion for summary judgment and denies Customs' cross-motion for summary judgment. Factual questions remain regarding whether the defects existed at the time of importation, and the amount of allowances tied to those defects. See Samsung II at 380, n.4 ("For purposes of the remand, we specially note that only those defects in existence at the time of importation qualify for an 'allowance' in value. Samsung thus bears the burden of proving, for instance, that the costs to repair defects under consumer warranties were incurred to repair defects in existence at importation, and not, for instance, those caused by its own mishandling or by consumer misuse of the

equipment."). The factual record to be developed at trial will include any new, relevant evidence produced by VW to meet the burden of proof on its 19 C.F.R. § 158.12 claim. See E.I. Dupont de Nemours and Co. v. United States, 24 CIT 1301, 1302–04, 123 F. Supp.2d 637, 639–41 (2000) (pursuant to 28 U.S.C. § 1581(a), the importer is permitted to present new evidence to develop the Court's record).

Richard W. Goldberg
SENIOR JUDGE

Dated: August 13, 2003
New York, New York

ERRATA

Volkswagen of America, Inc. v. United States, Court No. 96–00132, Slip Op. 03–104, issued August 13, 2003.

- On page 12, the sentence "Customs requires the protestant to establish the elements of 19 C.F.R. § 158.12 by clear and convincing evidence. See Samsung III, 23 CIT at 6, 35 F. Supp. 2d at 946 (approving this evidentiary standard)" should read "Customs requires the protestant to establish the elements of 19 C.F.R. § 158.12 by a preponderance of the evidence. Fabil Mfg. Co. v. United States, 237 F.3d 1335, 1340–41 (Fed. Cir. 2001)".

- On page 14, the sentence "Samsung III required the importer to establish by clear and convincing evidence which entries had defects at the time of importation. 23 CIT at 7–9, 35 F. Supp. 2d at 946–47" should read "Samsung III required the importer to establish by a preponderance of the evidence which entries had defects at the time of importation. 23 CIT at 7–9, 35 F. Supp. 2d at 946–47; see also Fabil Mfg., 237 F.3d at 1340–41".

- On page 14, the sentence "The third and final requirement for a successful claim under 19 C.F.R. § 158.12 is a showing by clear and convincing evidence of the amount of the allowances for each entry of the defective vehicles. Samsung III, 23 CIT 9–11, 35 F. Supp.2d at 948–50" should read "The third and final requirement for a successful claim under 19 C.F.R. § 158.12 is a showing by a preponderance of the evidence of the amount of the allowances for each entry of the defective vehicles. Samsung III, 23 CIT at 9–11, 35 F. Supp. 2d at 948–50; see also Fabil Mfg., 237 F.3d at 1340–41".

August 18, 2003.

Slip Op. 03–105

NISSEI SANGYO AMERICA, LTD., PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR.

Court No. 00–00113

[Plaintiff's motion for summary judgment is granted; liquidation instructions issued by U.S. Department of Commerce are remanded.]

Dated: August 18, 2003

Katten Muchin Zavis Rosenman (Michael E. Roll) for plaintiff Nissei Sangyo America, Ltd.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Patricia McCarthy Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Patrick V. Gallagher, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for defendant United States.

Hale & Dorr, LLP (Michael D. Esch) for defendant-intervenor Micron Technology, Inc.

OPINION

GOLDBERG, Senior Judge: Nissei Sangyo America, Ltd. ("NSA"), moves for summary judgment upon the agency record pursuant to USCIT R. 56.1, contesting the issuance of liquidation instructions contained in message numbers 9305211 and 9305212 ("Liquidation Instructions") by the U.S. Department of Commerce ("Commerce") to the U.S. Customs Service[1] ("Customs"), dated November 1, 1999. The Liquidation Instructions ordered the liquidation of NSA's entries of Dynamic Random Access Memory semiconductors of one megabit or above ("DRAMs") at the manufacturer's cash deposit rate rather than the rates determined for the manufacturer during the administrative reviews of May 6, 1996 and January 7, 1997.

For the reasons that follow, the Court holds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i).

I. BACKGROUND

NSA is an importer of Korean DRAMs manufactured by LG Semicon Co., Ltd. ("LG Semicon"), formerly Goldstar Electron Co., Ltd. ("Goldstar"). NSA purchased DRAMs manufactured by Goldstar

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[1] It has since become the U.S. Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

from an unnamed reseller, and entered 38 shipments between February 17, 1994 and April 28, 1995. At the time of entry, an antidumping duty order was in effect covering DRAMs imported by NSA. See Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, Antidumping Duty Order and Amended Final Determination, 58 Fed. Reg. 27,520 (May 10, 1993). Pursuant to the antidumping order of May 10, 1993, Commerce issued suspension instructions on May 25, 1993 ordering Customs to require NSA to post cash deposits of estimated antidumping duties applicable to the merchandise at issue, and such deposit was made. These suspension instructions provided deposit rates for all entries at the manufacturer's rate, and did not provide separate rates for importers or resellers. Id. at 27,522.

On June 15, 1994, Commerce initiated an administrative review of imports of DRAMs manufactured by Goldstar and Hyundai Electronics Co., Ltd. ("Hyundai"), another Korean manufacturer of DRAMs, that were imported into the United States from October 29, 1992 through April 30, 1994 ("POR 1"). Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 59 Fed. Reg. 30,770 (June 15, 1994). Upon conclusion of the administrative review, Commerce determined that the dumping margin for Goldstar was 0.00%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216, 20,222 (May 6, 1996).

On June 15, 1995, Commerce initiated a second administrative review of imports of DRAMs manufactured by LG Semicon and Hyundai that were imported into the United States from May 1, 1994 through April 30, 1995 ("POR 2"). Initiation of Antidumping and Countervailing Duty Administrative Review, 60 Fed. Reg. 31,447 (June 15, 1995). Commerce determined that the dumping margin for LG Semicon was de minimis at 0.01%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 965, 968 (Jan. 7, 1997).

Subsequently, Defendant-Intervenor Micron Technology, Inc. ("Micron") filed an action in opposition to the rates determined in POR 1 and POR 2 for LG Semicon. The Court of International Trade and the Court of Appeals for the Federal Circuit sustained the results of the first and second administrative reviews for LG Semicon DRAMs. Micron Technology v. United States, 23 CIT 55, 44 F. Supp. 2d 216 (1999); Micron Technology v. United States, 23 CIT 208, 40 F. Supp. 2d 481 (1999).

In addition, prior to the conclusion of the Micron cases, Commerce issued final results for a third administrative review period covering LG Semicon and Hyundai DRAMs that were imported from May 1, 1995 though April 30, 1996 ("POR 3"). During POR 3, Commerce is-

sued instructions to Customs to liquidate entries of LG Semicon and Hyundai DRAMs during that period irrespective of the identity of the importer.

Upon conclusion of the Micron cases, Commerce instructed Customs to assess antidumping duties on NSA's imports of LG Semicon DRAMs at the manufacturer's cash deposit rate upon entry. Commerce did not instruct Customs to liquidate NSA's entries at the rates determined for POR 1 or POR 2.

NSA contests the Liquidation Instructions and moves for summary judgment on the grounds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and were issued without advance notice to NSA. Commerce argues that the Court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i). Alternatively, Commerce argues that NSA has not exhausted its administrative remedies or that otherwise the Liquidation Instructions are rational and in accordance with law.

II. STANDARD OF REVIEW

Assuming that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(i), 28 U.S.C. § 2640(e) (1994) governs this case. Section 2640(e) establishes the standard of review in an action brought under 28 U.S.C. § 1581(i), providing that "[i]n any civil action not specified in this section, the Court of International Trade shall review the matter provided in section 706 of title 5." Accordingly, the Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

III. DISCUSSION

A. The Court has residual jurisdiction under § 1581(i).

As a threshold matter, Commerce argues that the Court lacks residual jurisdiction pursuant to 28 U.S.C. § 1581(i). Commerce claims that NSA had an alternative remedy under § 1581(c). It claims that NSA could have filed an independent request for an administrative review and/or participated in POR 1 and POR 2 under § 1581(c). Commerce argues that this alternative remedy renders § 1581(i) residual jurisdiction unavailable.

NSA argues that Commerce's prior practice dictated that the rates determined during the administrative review periods applied to all importers of the subject merchandise. This was the governing practice irrespective of whether the importer filed an individual request for an administrative review. In support of this argument, NSA points to Consolidated Bearings Company v. United States, 25 CIT ___, 166 F. Supp. 2d 580 (2001) and ABC International Traders, Inc. v. United States, 19 CIT 787 (1995). Additionally, NSA points to two

notices recently published by Commerce. See "Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties," 68 Fed. Reg. 23,954 (May 6, 2003) ("Final Notice"); "Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Amendment to Notice of Opportunity To Request Administrative Review," 68 Fed. Reg. 26,288 (May 15, 2003) ("Amendment to Final Notice"). NSA argues that these notices constitute Commerce's admission that the Liquidation Instructions constituted a change from its past practice without notice and that, prior to the issuance of the Liquidation Instructions, entries for a given importer such as NSA were liquidated at the rate determined for the producer of the subject merchandise in the administrative review.

The merits of this action and the resolution of the jurisdictional issue are intertwined. Pursuant to § 1581(i), the Court does not possess jurisdiction to decide issues relating to antidumping law if review is specifically provided for by other subparagraphs of § 1581. "[I]t is well established that the residual jurisdiction of the court under [sub]section 1581(i) 'may not be invoked when jurisdiction under another [sub]section of § 1581 is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate.' " Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 583 (quoting Ad Hoc Comm. of Fla. Producers of Gray Portland Cement v. United States, 22 CIT 902, 906, 25 F. Supp. 2d 352, 357 (1998) (internal citation omitted) (emphasis in original)).

In Consolidated, Commerce issued liquidation instructions that required Customs to assess antidumping duties on the plaintiff-importer's entries of the subject merchandise at the cash deposit rates in effect at the time of entry instead of at the weighted-average rates determined for the subject merchandise in the amended final results of the administrative review. The plaintiff-importer contested the instructions on the grounds that they were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and requested that Customs apply the liquidation rates determined in the administrative review. The court found that it "[was] appropriate to exercise residual jurisdiction because jurisdiction under other subsections of section 1581 [was] not available." Id. at 583. The court explained that:

> Commerce's liquidation instructions also are not reviewable under subsection 1581(c) because they were not part of the Final Results or the Amended Final Results. Rather, such instructions are issued after relevant final determinations are published and, accordingly, it was impossible for [the importer] to contest the instructions as required under 19 U.S.C. § 1516a(a)(2)(B)(iii) (1994). . . [F]inally, none of the other subsections of section 1581 of Title 19 provides a viable basis for jurisdiction. Id.

In the instant case, Commerce did not publish the Liquidation Instructions until November 1, 1999. This was after the final results of POR 1 and POR 2 were published on May 6, 1996 (61 Fed. Reg. 20,216) and January 7, 1997 (62 Fed. Reg. 965), respectively. The Liquidation Instructions changed Commerce's prior instructions in message number 7128114 issued for POR 2, dated May 8, 1997. Those instructions ordered Customs to liquidate "all entries covered by the [Order] at the rates established in the administrative reviews for the three Korean manufacturers: Goldstar, Hyundai, and Samsung." In addition, the reasoning set forth in ABC dictated that in the absence of another or "all other" rate, all importers of the subject merchandise were covered by the review. Thus, it was reasonable for NSA to assume that its entries would be liquidated at the administrative review rates and that it need not file an independent request for an administrative review pursuant to §1581(c). NSA, as an importer of DRAMs covered in POR 1 and POR 2, should have been able to rely on such assessment without apprehension that Commerce would change its mind later and change the properly assessed rates. Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 593.

Likewise, in ABC, the court held that the manufacturers' rates determined in the administrative review applied to the plaintiff-reseller since there was no other rate that could have applied:

> Absent an applicable reseller, or even an 'all other' rate, [the plaintiff] should have known that it would have been assigned the only existing rates, that is, the manufacturers' duty rates determined in the final results of the various administrative reviews. The fact that no review was requested to establish rates for the resellers at issue, or for ABC individually, does not compel Commerce to apply the automatic assessment regulation in this case. In fact, Commerce is compelled to apply the manufacturers' rates as determined on review, because no reseller rates exist. ABC, 19 CIT at 790.

Similarly, at the time of entry, a § 1581(c) request by NSA was wholly unnecessary, thereby failing to provide an adequate remedy under the reasoning set forth in ABC. Finally, Commerce does not present the argument that any other subsection of § 1581 provided NSA with an adequate remedy, and the Court finds no other subsection of § 1581 applicable.

Accordingly, the Court exercises jurisdiction over the matter under 28 U.S.C. § 1581(i).

B. The exhaustion doctrine does not dictate dismissal of NSA's claim.

Commerce argues that the exhaustion doctrine applies since Commerce never had an opportunity to properly consider NSA's argu-

ment. This was allegedly because NSA never presented the issue to Commerce in the appropriate administrative proceeding. NSA asserts that the exhaustion doctrine does not apply to the instant case because its circumstances qualify it as an exception. Specifically, NSA maintains that it had no reason to expect that Commerce would refuse to apply the manufacturer's rates to its entries. Alternatively, NSA claims that the issue at hand is of a purely legal nature that requires no further agency involvement.

The exhaustion doctrine requires that a party present its claims to the relevant administrative agency for the agency's consideration before bringing these claims to the Court. Consolidated, 25 CIT at ___, 166 F. Supp. 2d at 586 (citing Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 155 (1946)). However, there is no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. Id. (citing Alhambra Foundry Co. v. United States, 12 CIT 343, 346–47, 685 F. Supp. 1252, 1255–56 (1988)). Thus, the Court has the discretion to determine proper exceptions to the doctrine of exhaustion. Id.

Exceptions to the requirement of exhaustion have been found where requiring it (1) would be futile or (2) would be "inequitable and an insistence of a useless formality." See Rhone Poulenc, S.A. v. United States, 7 CIT 135, 153, 583 F. Supp. 607, 610 (1984); United States Canes Sugar Refiners' Ass'n v. Block, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982). A second exception exists where the "question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question." See id.

The circumstances in the instant case fall under the "pure question of law" exception to the exhaustion doctrine. In Consolidated, the court set out the requirements for the "pure question of law" exception as follows: (a) plaintiff's argument is new; (b) this argument is of a purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce time and resources. See Consolidated, 25 CIT at ___, 166 F. Supp. 2d at 587. This instant case presents a pure question of law that fits squarely within this exception for the reasons that follow: (a) NSA's presents a new argument to the Court; (b) the inquiry involves a question of law—namely, whether Commerce's liquidation instructions are arbitrary and capricious; (c) the inquiry does not require any special expertise by Commerce and/or the development of a special factual record either before or after the Court's consideration of the issue; and (d) for the reason mentioned in part (c), judicial inquiry here will not create undue delay or unnecessary expenditure. Id.

C. The Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

NSA argues that the Liquidation Instructions are arbitrary, capricious, and contrary to law, and were issued without advance notice to NSA. Commerce contends that the Liquidation Instructions are rational and in accordance with law, and were issued within the scope of its authority.

Commerce argues that since NSA did not argue that LG Semicon knew its goods were destined for export to the United States, NSA is not covered by the administrative reviews. In support of its argument, Commerce refers to the "knowledge test" upheld in NSK Ltd. v. United States, 190 F. 3d 1321, 1334 (Fed. Cir. 1999). Commerce's argument is flawed. The knowledge test that was upheld in NSK only applies to the producer, LG Semicon, and speaks nothing of the application of the administrative reviews to the importer, NSA. See generally id. The knowledge test as it stands in NSK is inapplicable to this case. Therefore, Commerce asks the Court to hold that the knowledge test stands for the proposition that the importer is only covered by an administrative review if the producer knew that its goods were destined for export to the United States. See Defendant's Response in Opposition to Plaintiff's Motion for Judgment upon the Agency Record, 20. However, Commerce has not spoken of this application of the knowledge test in the past. Additionally, Commerce failed to speak of this application of the knowledge test in the liquidation instructions issued in POR 1 and POR 2 and, thereby, issued the contested instructions without explaining the basis for its action. Therefore, this application of the knowledge test was unwarranted. See Consolidated, 25 CIT at ___ , ___ , 166 F. Supp. 2d at 589, 590 ("If the Department of Commerce fails to explain the basis for its liquidation instructions, Commerce's action is arbitrary and capricious.").

In Consolidated, the court found arbitrary and capricious liquidation instructions that changed Commerce's previous practice of liquidating at the rate determined in the administrative review but instead liquidated at the cash deposit rate. The court found the instructions arbitrary, in part, because they were not clear to the plaintiff and were completely contrary to instructions that were issued previously. The court saw the following problems with Commerce's action:

> Considering that on September 9, 1997, Commerce already instructed Customs to liquidate certain entries subject to the review at certain rates, it is entirely unclear to this Court why, almost a year later, Commerce felt compelled to issue the

> liquidation instructions at issue if, as Commerce now contends, the conclusions contained in these liquidation instructions were already self-evident from the very same record and from the previously issued September 9, 1997, instructions. . . . Such action by Commerce shows that Commerce contemplated a scenario under which certain entries of the [subject merchandise], including [the merchandise] manufactured by the [plaintiff-importer] could have been liquidated at one rate prior to the issuance of the contested liquidation instructions and an entirely different rate after the issuance of [said] instructions. Id. at 592.

The Court finds the same problem with the Liquidation Instructions in the instant case. Commerce issued new instructions on November 1, 1999 and, thereby, changed its past practice of liquidating at "the rate established for the most recent period for the manufacturer of the merchandise." 61 Fed. Reg. 20,216, 20,222. The Liquidation Instructions were issued without notice to NSA, which had no reason to know that Commerce would change the instructions and require it to request a separate and independent administrative review. Commerce's past practice and the reasoning set forth in ABC and Consolidated gave NSA a reasonable expectation that their entries were covered by the rates established in POR 1 and POR 2, and therefore that they would not need to file an independent request for an administrative review. The Final Notice and Amendment to Final Notice appear to acknowledge Commerce's past liquidation practice. See 68 Fed. Reg. 23,954; 68 Fed. Reg. 26,288. NSA had no reason to know that their entries were not covered by the rates determined in POR 1 and POR 2. Commerce failed to explain the basis for the Liquidation Instructions at issue and failed to provide NSA with notice of the change. See Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 590. Therefore, the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id.

IV. CONCLUSION

For the aforementioned reasons, the Court finds that jurisdiction attaches under 28 U.S.C. § 1581(i) and that NSA's claim is not precluded by the exhaustion doctrine. In addition, for the reasons stated herein, the Court finds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Pursuant to this opinion, this case is remanded to Commerce to (1) rescind the Liquidation Instructions and (2) issue new instructions ordering Customs to liquidate and/or re-liquidate NSA's entries at

the antidumping rates determined for LG Semicon during POR 1 and POR 2.

Richard W. Goldberg
Senior Judge

Date: August 18, 2003
New York, New York

Slip Op. 03–106

RENESAS TECHNOLOGY AMERICA, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT.

Court No. 00–00114

[Plaintiff's motion for summary judgment is granted; liquidation instructions issued by U.S. Department of Commerce are remanded.]

Dated: August 18, 2003

McDermott, Will & Emery (David J. Levine) for plaintiff Renesas Technology America, Inc.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Patrick V. Gallagher, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for defendant United States.

Hale & Dorr, LLP (Michael D. Esch) for defendant-intervenor Micron Technology, Inc.

OPINION

GOLDBERG, Senior Judge: Plaintiff Renesas Technology America, Inc.[1] ("Renesas"), moves for summary judgment upon the agency record pursuant to USCIT R. 56.1, contesting the issuance of liquidation instructions contained in message numbers 9305211 and 9305212 ("Liquidation Instructions") by the U.S. Department of Commerce ("Commerce") to the U.S. Customs Service[2] ("Customs"),

[1] Plaintiff, formerly known as Hitachi Semiconductor (America), Inc., has changed its name to Renesas Technology America, Inc. See Certificate of Amendment to the Certificate of Incorporation of Hitachi Semiconductor (America) Inc. (Mar. 31, 2003).

[2] It has since become the U.S. Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

dated November 1, 1999. The Liquidation Instructions ordered the liquidation of Renesas's entries of Dynamic Random Access Memory semiconductors of one megabit or above ("DRAMs") at the manufacturer's cash deposit rate rather than the rates determined for the manufacturer during the administrative reviews of May 6, 1996 and January 7, 1997.

For the reasons that follow, the Court holds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i).

I. BACKGROUND

Renesas is an importer of Korean DRAMs manufactured by LG Semicon Co., Ltd. ("LG Semicon"), formerly Goldstar Electron Co., Ltd. ("Goldstar"). Renesas purchased DRAMs manufactured by Goldstar from a reseller, and entered numerous shipments in 1993, 1994, and 1995. At the time of entry, an antidumping duty order was in effect covering DRAMs imported by Renesas. See Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, Antidumping Duty Order and Amended Final Determination, 58 Fed. Reg. 27,520 (May 10, 1993). Pursuant to the antidumping order of May 10, 1993, Commerce issued suspension instructions on May 25, 1993 ordering Customs to require Renesas to post cash deposits of estimated antidumping duties applicable to the merchandise at issue, and such deposit was made. These suspension instructions provided deposit rates for all entries at the manufacturer's rate, and did not provide separate rates for importers or resellers. Id. at 27,522.

On June 15, 1994, Commerce initiated an administrative review of imports of DRAMs manufactured by Goldstar and Hyundai Electronics Co., Ltd. ("Hyundai"), another Korean manufacturer of DRAMs, that were imported into the United States from October 29, 1992 through April 30, 1994 ("POR 1"). Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 59 Fed. Reg. 30,770 (June 15, 1994). Upon conclusion of the administrative review, Commerce determined that the dumping margin for Goldstar was 0.00%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216, 20,222 (May 6, 1996).

On June 15, 1995, Commerce initiated a second administrative review of imports of DRAMs manufactured by LG Semicon and Hyundai that were imported into the United States from May 1, 1994 through April 30, 1995 ("POR 2"). Initiation of Antidumping and Countervailing Duty Administrative Review, 60 Fed. Reg.

31,447 (June 15, 1995). Commerce determined that the dumping margin for LG Semicon was de minimis at 0.01%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 965, 968 (Jan. 7, 1997).

Subsequently, Defendant-Intervenor Micron Technology, Inc. ("Micron") filed an action in opposition to the rates determined in POR 1 and POR 2 for LG Semicon. The Court of International Trade and the Court of Appeals for the Federal Circuit sustained the results of the first and second administrative reviews for LG Semicon DRAMs. Micron Technology v. United States, 23 CIT 55, 44 F. Supp. 2d 216 (1999); Micron Technology v. United States, 23 CIT 208, 40 F. Supp. 2d 481 (1999).

In addition, prior to the conclusion of the Micron cases, Commerce issued its final results for a third administrative review period covering LG Semicon and Hyundai DRAMs that were imported from May 1, 1995 though April 30, 1996 ("POR 3"). During POR 3, Commerce issued instructions to Customs to liquidate entries of LG Semicon and Hyundai DRAMs during that period irrespective of the identity of the importer.

Upon conclusion of the Micron cases, Commerce instructed Customs to assess antidumping duties on Renesas's imports of LG Semicon DRAMs at the manufacturer's cash deposit rate upon entry. Commerce did not instruct Customs to liquidate Renesas's entries at the rates determined for POR 1 or POR 2.

Renesas contests the Liquidation Instructions and moves for summary judgment on the grounds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and were issued without advance notice to Renesas. Commerce argues that the Court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i). Alternatively, Commerce argues that Renesas has not exhausted its administrative remedies or that otherwise the Liquidation Instructions are rational and in accordance with law.

II. STANDARD OF REVIEW

Assuming that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(i), 28 U.S.C. § 2640(e) (1994) governs this case. Section 2640(e) establishes the standard of review in an action brought under 28 U.S.C. § 1581(i), providing that "[i]n any civil action not specified in this section, the Court of International Trade shall review the matter provided in section 706 of title 5." Accordingly, the Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

III. DISCUSSION

A. The Court has residual jurisdiction under § 1581(i).

As a threshold matter, Commerce argues that the Court lacks residual jurisdiction pursuant to 28 U.S.C. § 1581(i). Commerce claims that Renesas had an alternative remedy under § 1581(c). It claims that Renesas could have filed an independent request for an administrative review and/or participated in POR 1 and POR 2 under § 1581(c). Commerce argues that this alternative remedy renders § 1581(i) residual jurisdiction unavailable.

Renesas argues that Commerce's prior practice dictated that the rates determined during the administrative review periods applied to all importers of the subject merchandise. This was the governing practice irrespective of whether the importer filed an individual request for an administrative review. In support of this argument, Renesas points to Consolidated Bearings Company v. United States, 25 CIT ___, 166 F. Supp. 2d 580 (2001) and ABC International Traders, Inc. v. United States, 19 CIT 787 (1995). Additionally, Renesas points to two notices recently published by Commerce. See "Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties," 68 Fed. Reg. 23,954 (May 6, 2003) ("Assessment Policy Notice"); "Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Amendment to Notice of Opportunity To Request Administrative Review," 68 Fed. Reg. 26,288 (May 15, 2003) ("Review Amendment Notice"). Renesas argues that these notices constitute Commerce's admission that the Liquidation Instructions constituted a change from its past practice without notice and that, prior to the issuance of the Liquidation Instructions, entries for a given importer such as Renesas were liquidated at the rate determined for the producer of the subject merchandise in the administrative review.

The merits of this action and the resolution of the jurisdictional issue are intertwined. Pursuant to § 1581(i), the Court does not possess jurisdiction to decide issues relating to antidumping law if review is specifically provided for by other subparagraphs of § 1581. "[I]t is well established that the residual jurisdiction of the court under [sub]section 1581(i) 'may not be invoked when jurisdiction under another [sub]section of § 1581 is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate.' " Consolidated, 25 CIT at ___, 166 F. Supp. 2d at 583 (quoting Ad Hoc Comm. of Fla. Producers of Gray Portland Cement v. United States, 22 CIT 902, 906, 25 F. Supp. 2d 352, 357 (1998) (internal citation omitted) (emphasis in original)).

In Consolidated, Commerce issued liquidation instructions that required Customs to assess antidumping duties on the plaintiff-importer's entries of the subject merchandise at the cash deposit rates in effect at the time of entry instead of at the weighted-average

rates determined for the subject merchandise in the amended final results of the administrative review. The plaintiff-importer contested the instructions on the grounds that they were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and requested that Customs apply the liquidation rates determined in the administrative review. The court found that it "[was] appropriate to exercise residual jurisdiction because jurisdiction under other subsections of section 1581 [was] not available." Id. at 583. The court explained that:

> Commerce's liquidation instructions also are not reviewable under subsection 1581(c) because they were not part of the Final Results or the Amended Final Results. Rather, such instructions are issued after relevant final determinations are published and, accordingly, it was impossible for [the importer] to contest the instructions as required under 19 U.S.C. § 1516a(a)(2)(B)(iii) (1994). . . [F]inally, none of the other subsections of section 1581 of Title 19 provides a viable basis for jurisdiction. Id.

In the instant case, Commerce did not publish the Liquidation Instructions until November 1, 1999. This was after the final results of POR 1 and POR 2 were published on May 6, 1996 (61 Fed. Reg. 20,216) and January 7, 1997 (62 Fed. Reg. 965), respectively. The Liquidation Instructions changed Commerce's prior instructions in message number 7128114 issued for POR 2, dated May 8, 1997. Those instructions ordered Customs to liquidate "all entries covered by the [Order] at the rates established in the administrative reviews for the three Korean manufacturers: Goldstar, Hyundai, and Samsung." In addition, the reasoning set forth in ABC dictated that in the absence of another or "all other" rate, all importers of the subject merchandise were covered by the review. Thus, it was reasonable for Renesas to assume that its entries would be liquidated at the administrative review rates and that it need not file an independent request for an administrative review pursuant to § 1581(c). Renesas, as an importer of DRAMs covered in POR 1 and POR 2, should have been able to rely on such assessment without apprehension that Commerce would change its mind later and change the properly assessed rates. Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 593.

Likewise, in ABC, the court held that the manufacturers' rates determined in the administrative review applied to the plaintiff-reseller since there was no other rate that could have applied:

> Absent an applicable reseller, or even an 'all other' rate, [the plaintiff] should have known that it would have been assigned the only existing rates, that is, the manufacturers' duty rates determined in the final results of the various administrative reviews. The fact that no review was requested to establish rates

> for the resellers at issue, or for ABC individually, does not compel Commerce to apply the automatic assessment regulation in this case. In fact, Commerce is compelled to apply the manufacturers' rates as determined on review, because no reseller rates exist. ABC, 19 CIT at 790.

Similarly, at the time of entry, a § 1581(c) request by Renesas was wholly unnecessary, thereby failing to provide an adequate remedy under the reasoning set forth in ABC. Finally, Commerce does not present the argument that any other subsection of § 1581 provided Renesas with an adequate remedy, and the Court finds no other subsection of § 1581 applicable.

Accordingly, the Court exercises jurisdiction over the matter under 28 U.S.C. § 1581(i).

B. The exhaustion doctrine does not dictate dismissal of Renesas's claim.

Commerce argues that the exhaustion doctrine applies since Commerce never had an opportunity to properly consider Renesas's argument. This was allegedly because Renesas never presented the issue to Commerce in the appropriate administrative proceeding. Renesas asserts that the exhaustion doctrine does not apply to the instant case because its circumstances qualify it as an exception. Specifically, Renesas maintains that it had no reason to expect that Commerce would refuse to apply the manufacturer's rates to its entries. Alternatively, Renesas claims that the issue at hand is of a purely legal nature that requires no further agency involvement.

The exhaustion doctrine requires that a party present its claims to the relevant administrative agency for the agency's consideration before bringing these claims to the Court. Consolidated, 25 CIT at ___, 166 F. Supp. 2d at 586 (citing Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 155 (1946)). However, there is no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. Id. (citing Alhambra Foundry Co. v. United States, 12 CIT 343, 346–47, 685 F. Supp. 1252, 1255–56 (1988)). Thus, the Court has the discretion to determine proper exceptions to the doctrine of exhaustion. Id.

Exceptions to the requirement of exhaustion have been found where requiring it (1) would be futile or (2) would be "inequitable and an insistence of a useless formality." See Rhone Poulenc, S.A. v. United States, 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984); United States Canes Sugar Refiners' Ass'n v. Block, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982). A second exception exists where the "question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question." See id.

The circumstances in the instant case fall under the "pure question of law" exception to the exhaustion doctrine. In Consolidated,

the court set out the requirements for the "pure question of law" exception as follows: (a) plaintiff's argument is new; (b) this argument is of a purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce time and resources. See Consolidated, 25 CIT at ___, 166 F. Supp. 2d at 587. This instant case presents a pure question of law that fits squarely within this exception for the reasons that follow: (a) Renesas's presents a new argument to the Court; (b) the inquiry involves a question of law—namely, whether Commerce's liquidation instructions are arbitrary and capricious; (c) the inquiry does not require any special expertise by Commerce and/or the development of a special factual record either before or after the Court's consideration of the issue; and (d) for the reason mentioned in part (c), judicial inquiry here will not create undue delay or unnecessary expenditure. Id.

C. The Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Renesas argues that the Liquidation Instructions are arbitrary, capricious, and contrary to law, and were issued without advance notice to Renesas. Commerce contends that the Liquidation Instructions are rational and in accordance with law, and were issued within the scope of its authority.

Commerce argues that since Renesas did not argue that LG Semicon knew its goods were destined for export to the United States, Renesas is not covered by the administrative reviews. In support of its argument, Commerce refers to the "knowledge test" upheld in NSK Ltd. v. United States, 190 F. 3d 1321, 1334 (Fed. Cir. 1999). Commerce's argument is flawed. The knowledge test that was upheld in NSK only applies to the producer, LG Semicon, and speaks nothing of the application of the administrative reviews to the importer, Renesas. See generally id. The knowledge test as it stands in NSK is inapplicable to this case. Therefore, Commerce asks the Court to hold that the knowledge test stands for the proposition that the importer is only covered by an administrative review if the producer knew that its goods were destined for export to the United States. See Defendant's Response in Opposition to Plaintiff's Motion for Judgment upon the Agency Record, 20. However, Commerce has not spoken of this application of the knowledge test in the past. Additionally, Commerce failed to speak of this application of the knowledge test in the liquidation instructions issued in POR 1 and POR 2 and, thereby, issued the contested instructions without explaining the basis for its action. Therefore, this application of the knowledge test was unwarranted. See Consolidated, 25 CIT at ___, ___, 166

F. Supp. 2d at 589, 590 ("If the Department of Commerce fails to explain the basis for its liquidation instructions, Commerce's action is arbitrary and capricious.").

In Consolidated, the court found arbitrary and capricious liquidation instructions that changed Commerce's previous practice of liquidating at the rate determined in the administrative review but instead liquidated at the cash deposit rate. The court found the instructions arbitrary, in part, because they were not clear to the plaintiff and were completely contrary to instructions that were issued previously. The court saw the following problems with Commerce's action:

> Considering that on September 9, 1997, Commerce already instructed Customs to liquidate certain entries subject to the review at certain rates, it is entirely unclear to this Court why, almost a year later, Commerce felt compelled to issue the liquidation instructions at issue if, as Commerce now contends, the conclusions contained in these liquidation instructions were already self-evident from the very same record and from the previously issued September 9, 1997, instructions. . . . Such action by Commerce shows that Commerce contemplated a scenario under which certain entries of the [subject merchandise], including [the merchandise] manufactured by the [plaintiff-importer] could have been liquidated at one rate prior to the issuance of the contested liquidation instructions and an entirely different rate after the issuance of [said] instructions. Id. at 592.

The Court finds the same problem with the Liquidation Instructions in the instant case. Commerce issued new instructions on November 1, 1999 and, thereby, changed its past practice of liquidating at "the rate established for the most recent period for the manufacturer of the merchandise." 61 Fed. Reg. 20,216, 20,222. The Liquidation Instructions were issued without notice to Renesas, which had no reason to know that Commerce would change the instructions and require it to request a separate and independent administrative review. Commerce's past practice and the reasoning set forth in ABC and Consolidated gave Renesas a reasonable expectation that their entries were covered by the rates established in POR 1 and POR 2, and therefore that they would not need to file an independent request for an administrative review. The Assessment Policy Notice and Review Amendment Notice appear to acknowledge Commerce's past liquidation practice. See 68 Fed. Reg. 23,954; 68 Fed. Reg. 26,288. Renesas had no reason to know that their entries were not covered by the rates determined in POR 1 and POR 2. Commerce failed to explain the basis for the Liquidation Instructions at issue and failed to provide Renesas with notice of the change. See Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 590. Therefore, the Liqui-

dation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id.

IV. CONCLUSION

For the aforementioned reasons, the Court finds that jurisdiction attaches under 28 U.S.C. § 1581(i) and that Renesas's claim is not precluded by the exhaustion doctrine. In addition, for the reasons stated herein, the Court finds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Pursuant to this opinion, this case is remanded to Commerce to (1) rescind the Liquidation Instructions and (2) issue new instructions ordering Customs to liquidate and/or re-liquidate Renesas's entries at the antidumping rates determined for LG Semicon during POR 1 and POR 2.

Richard W. Goldberg
Senior Judge

Date: August 18, 2003
New York, New York

Slip Op. 03–107

SKECHERS U.S.A., INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT,

Consol. Court No. 98–03245

[Defendant's motion for summary judgment granted in part, denied in part.]

Dated: August 19, 2003

Law Offices of Elon A. Pollack (Elon A. Pollack) for plaintiff.

Peter D. Keisler, Assistant Attorney General, John J. Mahon, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Amy M. Rubin), Beth C. Brotman, Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection of the United States Department of Homeland Security, of counsel, for defendant.

OPINION

RESTANI, Judge:

This matter is before the court on a motion for summary judgment pursuant to USCIT Rule 56(c) brought by defendant, the Bureau of

Customs and Border Protection of the United States Department of Homeland Security ("Customs"). Customs asks the court to decide, as a matter of law, that plaintiff Skechers U.S.A., Inc. ("Skechers"), failed to prove that its claimed interest payments made on imported footwear were bona fide. In the alternative, Customs requests that the court decide, as a matter of a law, that Skechers failed to satisfy statutory and regulatory requirements for interest charges to be non-dutiable.

FACTUAL AND PROCEDURAL BACKGROUND

Skechers is a California-based importer, and the exclusive U.S. distributor, of "Skechers" brand footwear. The majority of its products are manufactured in the People's Republic of China and are shipped to the United States from Hong Kong through the port of Los Angeles.

The company was founded in 1992 and often "financed" its footwear purchases through a combination of letters of credit and delayed payments. According to Skechers, it would typically enter into oral financing agreements with its suppliers whereby Skechers was to pay an "interest" fee every time it deferred full payment on the applicable invoices. In most cases the "interest" rate was 2% of the transaction amount and allegedly reflected the prime rate of the suppliers' home countries (Taiwan and Hong Kong) at the time of each transaction, plus rate increases attributable to factors such as the short-term nature of the financing and Skechers's absence of domicile and assets in those countries. See Pl.'s Opp'n Def.'s Mot. Summ. J. at 10–12. The applicable rate for the unsecured "loans" would be effective for the first 30, 45, 60, or 90 days depending on the supplier, and Skechers agreed to negotiate additional interest and penalties for payments made after the initial financing periods. See Supplemental Decl. of Douglas Parker ("Supp. Parker Decl.") ¶12 & Ex. A (producing written financing agreements for most of Skechers's suppliers). According to Skechers, it operated under oral financing agreements with its suppliers for up to two years before they were memorialized in formal written financing agreements. See Pl.'s Opp'n Def.'s Renewed Mot. Summ. J. at 9.

Since 1995, Customs has been appraising Skechers's entries at "transaction value" as set forth in 19 U.S.C. § 1401a(b) (1994) (describing appraisal methods). For each of Skechers's entries, Customs determined that the transaction value of the imported footwear was the invoice price plus the claimed interest charge. Skechers has filed numerous protests with Customs since that time, claiming, among other things, that the charges were not dutiable under § 1401a because they constituted interest payments. Customs denied the protests based on its conclusion that Skechers had not complied with the statute and applicable regulatory guidance.

Skechers appealed the protest denials to the Court of International Trade, claiming that the finance charges were exempt from duty pursuant to the statute. As such, Skechers requested a refund of those duties charged plus interest. Customs responded that the charges did not constitute bona fide interest payments within its interpretation of the statute and Generally Accepted Accounting Principles ("GAAP"), adding that its statutory interpretation is entitled to deference under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that an agency's interpretation may be entitled to some deference based on its "power to persuade"). Customs also argued that Skechers had failed to comply with the statute and the applicable regulatory guidance, citing Luigi Bormioli Corp. v. United States, 118 F. Supp. 2d 1345 (Ct. Int'l Trade 2000) (granting summary judgment in favor of Customs where importer failed to prove that payments in dispute were bona fide interest payments as defined by Customs's interpretation of § 1401a), aff'd, 304 F.3d 1362 (Fed. Cir. 2002).

The court declined to rule on the government's first motion for summary judgment because of the parties' disputes as to which fact patterns were at issue, and ordered the expansion of the test case to make it meaningful.[1] Order of Feb. 8, 2002. This gave Plaintiff a second shot at making its factual presentation coherent.[2]

On March 21, 2003, the court issued an order indicating that Skechers had failed to comply with the court's February 2002 order requiring it to submit a "full package of evidence" demonstrating satisfaction of Customs's guidelines as interpreted from § 1401a. The court ordered Skechers to prepare a detailed chart relating the evidence with each entry or face a default judgment. Skechers filed a chart on April 18, 2003, that contains, among other things, a list of every entry number in dispute and related information on Skechers's manufacturers and suppliers, invoice issue dates, and claimed interest amounts paid. The chart also purports to itemize where the court can find evidence that Skechers satisfied the applicable regulatory requirements, see Discussion infra, to prove that its claimed interest charges should not be included in transaction value under § 1401a.

The chart, however, does not fully comply with the court's order. It often contains inaccurate or misleading information, or fails to direct the court to the supporting evidence altogether.[3] Significantly, while

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[1] The court designated this matter a test case and suspended related court actions pending final decision herein on December 21, 2000. The test case included fourteen entries from 1997. The court designated Court No. 99–11–00697 (26 entries from 1998) and Court No. 00–09–00456 (61 entries, most in 1999) as additional test cases and consolidated them with Court No. 98–03245 on September 25, 2002.

[2] Plaintiff's counsel repeatedly has requested a trial, but plaintiff cannot get to trial unless it demonstrates that it will present evidence to sustain its claim.

[3] For example, the chart does not indicate where the court can find evidence of a written financing agreement between Skechers and supplier Lusung Shoe. See Pl.'s Chart of Evi-

the chart lists the invoice date and the rate of interest for each entry, the chart itself does not indicate, for any of Skechers's entries, when those interest payments were made or what the agreement terms were. Because the chart does not reveal the length of the delay between the invoice issue date and the date of the interest payments, it is impossible for the court to determine whether the amount paid complied with the terms of Skechers's financing agreements.[4] As discussed infra, Skechers provides supporting documentation on payment dates for only three of the 101 entries at issue in this consolidated test case.

The chart reveals 14 entries covered by the original Court No. 98–12–03245 test case. For those entries where interest payments were made, the interest amount paid by Skechers is consistently stated to be 2%. Written financing agreements existed between Skechers and these suppliers/manufacturers at the time of entry,[5] and the agreements each set forth a rate of interest "up to 2% of the invoice price per month up to 90 days" with the potential for higher interest rates and penalties for payments made past 90 days. See Decl. of William Liao Ex. A; Supp. Parker Decl. Ex. A. Skechers, however, provides no information regarding when its invoice payments were made, rendering it impossible to determine whether Skechers complied with the terms of its agreements for these entries.

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dence, Entry Nos. 175–0336827–0, 175–0337349–4, 175–0754925–5, 175–0755226–7, 175–0755389–3, and 175–0755403–2. Nor is such direction provided for suppliers Pacific Footgear, see id. Entry Nos. 175–0755224–2, 175–0755509–6, 175–0755709–2, 175–0755587–2, and 175–0755492–5; Hwashun/Morgan International, see id. Entry Nos. 175–0753338–2 and 175–0754143–5; Luxfull/Lux S.R.L., see id. Entry No. 175–0348188–3; Shoe Biz, see id. Entry No. 175–0755605–2; and Long Shoe, JJL Fashion, and Pacific Footwear, see id. Entry No. 175–0347665–1. Evidence of written financing agreements is crucial to Skechers case under Customs's regulatory guidance but is not provided for any of these suppliers. For Entry No. 175–0347665–1, the chart also fails to show where the court can verify that the goods at issue were actually sold at the price declared as paid or payable, another regulatory requirement for proving that interest payments are non-dutiable, for Long Shoe, JJL Fashion, and Pacific Footwear.

The exhibits also reveal discrepancies between the interest payments as documented by the evidence and the interest payments as claimed by the chart. For example, for Entry No. 175–0347510–9 (Asia Billion, 2/7/98), 1.5% interest was paid although the chart claims that 0% interest was paid. Similarly, for Entry No. 175–0754362–1 (Enble/Reflex, 3/18/99), the interest payment was 2%, but the chart claims 1.4% in interest paid. Finally, for Entry No. 175–0755694–6 (Schaefer, 6/10/99), Skechers's actual interest payment was 1.5% of the financed amount, though the chart claims that Skechers paid 0.7% of the total invoice price.

[4] The chart does reveal that, in practice, Skechers's interest payments amounted to a flat rate of 2% of the invoice amount for just over half the transactions at issue. Within the 101 entries at issue are 114 payment transactions. Of these 114 transactions, the chart itemizes 62 occurrences of 2% in interest paid, 35 occurrences of 1.5% in interest paid, 5 occurrences of 1%, 2 occurrences of 1.2%, 1 occurrence of 1.4%, 1 occurrence of 0.7% , and 8 occurrences of 0% or no interest paid. See Pl.'s Chart of Evidence. This information, however, is not meaningful without proof of the terms of each financing agreement and the corresponding payment dates.

[5] Skechers did not have written financing agreements at the time of entry, and did not pay interest to, two suppliers included in the original test case: Lusung Shoe and Reflex Corporation of America (parent corporation to Dar Shyong and Enble/Enable Enterprises). See id.; Supp. Parker Decl. Ex. A.

Of the 26 entries covered by the Court No. 99–11–00697 test case, there are 14 entries where the financing agreements purporting to govern the transactions post-date the corresponding invoice issue dates, which means that the court cannot verify the precise terms that governed these transactions.[6] Another nine entries are ostensibly governed by written agreements that were in place at the time of entry,[7] but Skechers again fails to provide information regarding when payment for these nine entries were made, making it impossible to determine whether the agreement terms were followed. The remaining three entries are discussed infra.

Of the 61 entries covered by the Court No. 00–09–00456 test case, there are 20 entries where the agreed-upon interest rates, as evidenced by the financing agreements, differ from the interest payments claimed by Skechers in the chart.[8] This could be attributable to payments made after the initial "loan" period, but Skechers provides no evidence of such. An additional six entries listed in the chart feature transactions that were not governed by written financing agreements.[9] For another 12 entries, Skechers provides no formal documentation whatsoever to prove that it had written agreements with these suppliers (all Hwashun/Morgan International, Lusung Shoe, Pacific Footgear, and Shoe Biz entries). For the remaining entries, Skechers provides proof of the applicable interest rates and lists interest payments made on the chart, but once again fails to provide information regarding when those payments were made, making it impossible to determine whether Skechers adhered to the agreement terms. In fact, for none of the 61 entries does Skechers provide sufficient information that would allow the court to verify compliance with its written agreements.

As illustrated, for the vast majority of the entries mentioned herein, adequate payment details cannot be found from the evidence supplied by Skechers, making verification of its adherence to agreement terms impossible. Examining the evidence as directed by the

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[6] The 14 entries without written agreements in place at the time of import are for suppliers Reflex, Asia Billion, and Hopeway/Diamond Group. Evidence of written financing agreements does not exist for suppliers Luxfull/Lux S.R.L., Long Shoe, JJL Fashion, and Pacific Footwear; Skechers, however, does not claim to have paid interest to these suppliers.

[7] This includes most entries by suppliers Easy Dense, Miri, and Shing Tak.

[8] Of the 20 entries, four are for supplier Easy Dense (where the paid interest was 1.5% and agreed-upon rate was 0.75% per month), six are for Evergo (where paid interest was 2% and agreed-upon rate was 1.33% per month), one for Enble/Reflex (1.4% paid, 1.33% per month agreed-upon rate), one for Dar Shyong/Reflex (2% paid, 1.33% per month agreed-upon rate), one for Allied Jet (1.5% paid, up to 1% per month agreed-upon rate), six for Hopeway/Diamond Group (1.5% paid, 1.33% per month agreed-upon rate), and one for supplier Shaefer (0.7% paid according to the chart, 1.5% per month of the financed amount was agreed-upon rate). See Pl.'s Chart of Evidence.

[9] Of these, four are for supplier Asia Billion, and suppliers Dar Shyong/Reflex and Evergo each had one entry that was not subject to a written financing agreement. See id.

chart reveals complete payment details for only three entries, all of which are covered by Court No. 99–11–00697. See Pl.'s Chart of Evidence, Entry Nos. 175–0347530–7 (Easy Dense, 2/16/98; 2% interest paid after 45 days; up to 2% per month up to 90 days is the agreed-upon rate), 175–0347512–5 (Miri, 2/11/98; 1.5% interest paid after 50 days, up to 2% per month up to 90 days is the agreed upon-rate), and 175–0347726–1 (Shing Tak, 3/3/98; 2% interest paid after 44 days; up to 2% per month up to 90 days is the agreed upon rate).

In sum, there is no evidence that Skechers strictly adhered to its agreements for any of the entries at issue.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The court will grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT Rule 56(c).

DISCUSSION

The "transaction value" of imported merchandise is defined as the "price actually paid or payable for the [imported] merchandise" plus any "packing costs" or "selling commission incurred by the buyer with respect to the imported merchandise," the "value, apportioned as appropriate, of any assist," any "royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise," and "the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller." 19 U.S.C. § 1401a(b). Although the statute does not expressly include or exclude interest payments as part of the transaction value, Customs regards interest payments as being non-dutiable and expressed this policy in Treasury Decision 85–111. See Treatment of Interest Charges in the Customs Value of Imported Merchandise, 19 Cust. B. & Dec. 258 (1985), 50 Fed. Reg. 27,886 (Customs Serv. July 8, 1985) [hereinafter "TD 85–111"]; see also Treatment of Interest Charges in the Customs Value of Imported Merchandise, 54 Fed. Reg. 29,973 (Customs Serv. July 17, 1989) [hereinafter "Statement of Clarification"].

TD 85–111 interprets § 1401a and was promulgated by Customs to implement a decision by the Committee on Customs Valuation of the General Agreements on Tarriffs and Trade. TD 85–111 provides four criteria for interest charges to be non-dutiable (part (c) contains the last two requirements):

> Charges for interest under a financing arrangement entered into by the buyer and relating to the purchase of imported goods shall not be regarded as part of the customs value provided that:
>
> (a) The charges are distinguished from the price actually paid or payable for the goods;
>
> (b) The financing arrangement was made in writing;
>
> (c) Where required, the buyer can demonstrate that
>
> —Such goods are actually sold at the price declared as the price actually paid or payable, and
>
> —The claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when the finance was provided.

TD 85–111, 50 Fed. Reg. at 27,886. Customs issued a Statement of Clarification to clarify TD 85–111. See Statement of Clarification, 54 Fed. Reg. at 29,974 ("Interest . . . encompass[es] only bona fide interest charges, not simply the notion of interest arising out of delayed payment. Bona fide interest charges are those payments that are carried on the importer's books as interest expenses in conformance with generally accepted accounting principles."). Without addressing the Statement of Clarification, Bormioli upheld TD 85–111 as a reasonable method of determining if interest is bona fide and nondutiable. See Bormioli, 118 F. Supp. 2d at 1350, aff'd, 304 F.3d at 1368–69.

Therefore, at the very least, the importer must establish that the claimed interest charges meet the four requirements set forth in TD 85–111, failing which summary judgment is appropriately granted in Customs's favor. See Bormioli, 304 F.3d at 1372–73. In the instant case the government concedes that the claimed interest charges were separately identified from the price paid or payable and that the claimed interest rate did not exceed TD 85–111's specifications. See Def.'s Mem. in Support Mot. Summ. J. at 18; see also Def.'s Supp. Mem. in Support Renewed Mot. Summ. J. at 5. The government argues that, as an initial matter, the charges do not meet a threshold for analysis under TD 85–111. Thus, the issues before the court are whether the charges may be analyzed under TD 85–111 and, if so, whether Skechers met the requirements that the financing agreements be in writing and that the goods were actually sold at the declared price.

A. Whether the Finance Charges are "Bona Fide Interest"

Customs maintains that the claimed finance charges are not bona fide interest payments, but rather flat fees that Skechers paid in re-

turn for a delayed payment schedule regardless of when it paid its invoices in full. Therefore, Customs asserts, the payments do not conform to any accepted definition of "interest"[10] and are thus outside the scope of TD 85–111 and the Statement of Clarification.

Skechers counters that the payments are "bona fide" for several reasons. First, the charges were bona fide because they were carried as interest expenses on Skechers's books in accordance with GAAP, as required by the Statement of Clarification. Skechers's independent certified public accountant, KPMG, certified the books as such. See Supp. Parker Decl. Exs. B & C (providing independent auditors' reports and internal accounting documents that separately list interest charges paid to each of Skechers's suppliers). Second, interest rates and payment terms varied with each supplier. Third, the written agreements refer to the payments as interest. Finally, Skechers points out that where invoices were covered in part by cash or letter of credit, interest was only charged for the unpaid balance. See, e.g., Supp. Parker Decl. ¶10 & Ex. A. Thus, Skechers maintains, the payments at issue are non-dutiable bona fide interest payments.

The Statement of Clarification requires only that the charges be carried as interest expenses on the importer's books in conformance with GAAP. Skechers has established this through its auditor's certification and internal accounting documents. Customs does not challenge this evidence and instead argues that a criterion not required by the Statement of Clarification, i.e., that the interest charges must be other than "flat fees," has not been fulfilled.[11] Customs has published reasonable tests for determining whether "interest" is bona fide and nondutiable. The court has upheld TD 85–111 and the test of the Statement of Clarification is not in dispute. Consequently, Customs's additional criterion is precluded by its own regulatory guidance. These issues are not easy and importers are entitled to a non-moving target.

B. The TD 85–111 Requirements

As indicated, Customs alternatively argues that Skechers has not met all of the TD 85–111 criteria. The Court of Appeals for the Federal Circuit, in affirming this court, noted that the criteria are conjunctive, i.e., all four have to be met for interest charges to be non-

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[10] See Lightbulb Online Dictionary of Financial Terms, Lightbulb Press, Inc. (2003), at http://www.lightbulbpress.com/onlinedictionary/onlinedictionary.html ("Interest is the cost of using the money provided by a loan, credit card, or line of credit, usually expressed as a percentage of the amount you borrow and pegged to a specified period of time."); see also BLACK'S LAW DICTIONARY 818 (7th ed. 1999) (defining "interest rate" as "[t]he percentage that a borrower of money must pay to the lender in return for the use of the money").

[11] The written agreements at issue may reflect more than simply "flat fees." Whether Skechers complied with the agreements is another issue.

dutiable. Bormioli, 304 F.3d at 1373. As discussed above, the court need only address the TD's requirements that the financing agreements be in writing and, if this requirement is met, that the goods were actually sold at the declared price.

Bormioli holds that while Customs may ignore de minimis variations from the terms of a written financing agreement, if parties repeatedly stray from its salient terms, then the written agreement requirement in TD 85–111 is not met. Bormioli, 304 F.3d 1372 (finding that the importer failed to satisfy the written financing agreement requirement when importer acknowledged departing from the terms of its agreements with its suppliers). "TD 85–111 does not merely require that the parties have a written financing arrangement, but that the written financing arrangement actually govern the payments at issue." Id.

To illustrate that it satisfied the written financing agreement requirement, Skechers submits photocopies of its written financing agreements for most of its suppliers. See Supp. Parker Decl. Ex. A. Skechers also provides declarations by officers from several of its suppliers asserting that they had oral financing agreements with Skechers that were memorialized approximately two years later.[12] Skechers points out that nowhere in the statute, TD 85–111, the Statement of Clarification, or other Customs guidelines, is there a prescribed format for the written agreement. Skechers concludes that this evidence satisfies the written financing agreement requirement and alternatively claims that any ambiguity in its agreements gives rise to genuine issues of material fact that make this case inappropriate for summary judgment.

Putting aside the argument that no format for the written financing agreement requirement exists, the question is whether an objective examination of the evidence indicates that Skechers sufficiently departed from the terms of its agreements so that the written fi-

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[12] Because Skechers claims to have had oral financing agreements with several of its suppliers before those agreements were memorialized, Skechers argues that there is a material issue of fact as to when the agreements were reached. Skechers insists that the written financing agreements should apply retroactively to the earlier transactions. This is an invitation to fraud. A written financing agreement must be in place when the goods are sold because it must govern the payments at issue. Bormioli, 304 F.3d at 1372.

Skechers also contends that, at a minimum, the written agreements should be held applicable to transactions that occurred after the agreement had been set forth in writing even if both parties had not had a chance to sign them. Skechers presents evidence to support this theory for suppliers Asia Billion (affiliated with Dah Lih Puh Co.) and Reflex Corporation. See Supp. Parker Decl. Ex. A. Skechers adds that past Customs Headquarters rulings concur with this analysis as does California contract law, which the parties deemed to be controlling by agreement. Because the court concludes, however, that Skechers has failed to provide enough information (specifically, payment dates) for the entries mentioned herein to prove that it either had written agreements or that it actually complied with their terms, it is not necessary to address the issue of whether some of the written agreements should apply retroactively.

nancing agreement requirement was not met. As discussed above, Skechers has only provided evidence which potentially supports its claim for three entries. See Pl.'s Chart of Evidence, Entry Nos. 175–0347512–5 (Miri, 2/11/98), 175–0347530–7 (Easy Dense, 2/16/98), and 175–0347726–1 (Shing Tak, 3/3/98). For the three entries for which the agreed-upon interest rate, the invoice issue date, the payment date, and the amount paid are all provided, there is some question as to whether the payments should be found to be consistent with the written agreements. For each of the three entries, the agreed-upon interest rate was "up to 2% of the invoice price per month up to 90 days." Skechers, however, paid the 2% interest charge on the Easy Dense shipment 45 days after the invoice date. Skechers paid Shing Tak 2% of the invoice amount 44 days after the invoice issue date. Finally, Skechers paid Miri a 1.5% interest fee 50 days after invoice issue date.

For all of the remaining entries, Skechers failed to provide enough information for Customs, or the court, to determine whether Skechers complied with the terms of its written financing agreements.[13] Thus, Skechers failed to prove that it satisfied the requirement that it's financing agreements were made in writing in compliance with TD 85–111, except perhaps as to Entry Nos. 175–0347512–5, 175–0347530–7, and 175–0347726–1. As to these three entries, a material issue of fact exists as to whether the time of payment represents a material change from the financing terms and whether the alleged interest payments qualify as "interest" under applicable published guidance.[14]

The government's arguments that the goods were not actually sold at the price declared as the price paid or payable relate to the status of the "interest" charges under the arguments addressed previously and cannot be further disposed of at this stage.

CONCLUSION

Except for the three entries mentioned above, the court finds that Skechers has failed to present evidence that its financing arrangements satisfied the written financing agreement requirement in TD

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[13] As discussed in the Facts section, many entries suffer from other evidentiary deficiencies. A substantial number of entries showed discrepancies between the agreed interest rates and the payments claimed by Skechers. Skechers provides no evidence of written financing agreements with several suppliers. Finally, many entries preceded the effective dates of the applicable financing agreements, taking these transactions outside TD 85–111. See supra n.12.

[14] Although Skechers has not submitted evidence of the non-materiality of the deviations, the government has not addressed this issue directly in its motion. Thus, summary judgment on these entries is not appropriate at this juncture.

85–111. Customs's motion for summary judgment is granted in part and the parties are instructed to attempt to resolve this matter and report to the court in fifteen days as to whether mediation is desired.

Jane A. Restani
JUDGE

Dated: New York, New York
This 19th day of August, 2003.

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